No. 90-6282-CFY
Status: GRANTED

Title: Daniel Touby, et ux., Petitioners
v.
United States

Docketed:
November 19, 1990

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Klein,Joel I.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Nov 19 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Dec 19 1990		Memorandum of respondent United States filed.
4	Dec 20 1990		DISTRIBUTED. January 11, 1991
6	Jan 14 1991		Petition GRANTED.
			**********
7	Feb 25 1991		Record filed.
		*	USDC D NJ-one vol.
8	Feb 25 1991		Record filed.
		*	USCA 3-one vol.
9	Feb 25 1991	X	Brief of petitioners Daniel Touby, et ux. filed.
10	Feb 27 1991		SET FOR ARGUMENT WEDNESDAY, APRIL 17, 1991. (1ST CASE)
11	Feb 27 1991		Joint appendix filed.
13	Mar 22 1991		CIRCULATED.
14	Mar 27 1991	X	Brief of respondent United States filed.
15	Apr 9 1991	X	Reply brief of petitioner Daniel Touby filed.
16	Apr 17 1991		ARGUED.

NOTE

CIS was unable at this time to obtain for filming all of the briefs for this case. All copies of the briefs listed below are in Justices's chambers or otherwise unavailable. Supplemental microfiche will be issued as soon as we are able to film these remaining documents.

PETITION FOR WRIT OF CERTIORARI

OPPOSITION BRIEF

No. 90-6282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL TOUBY, *et ux.*,
Petitioners

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 19, 1990
WRIT OF CERTIORARI GRANTED JANUARY 14, 1991

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RELEVANT DOCKET ENTRIES

Date	Proceedings
January 7, 1989	Indictments filed
February 6, 1989	D. Touby's motion for dismissal of indictment filed
February 17, 1989	L. Touby's motion to join in co-defendant's motion filed
March 20, 1989	Hearing on defendant's motion to dismiss indictment
March 31, 1989	Jury verdict delivered
July 21, 1989	Sentencing; judgment entered
July 21, 1989	Defendants' notices of appeal filed

UNITED STATES DISTRICT COURT
D. NEW JERSEY

Crim. A. No. 89-6

UNITED STATES OF AMERICA

v.

DANIEL TOUBY and LYRISSA TOUBY,
Defendants.

March 17, 1989

HAROLD A. ACKERMAN, District Judge.

On January 11, 1989, the Grand Jury in the United States District Court for the District of New Jersey in Newark returned a two-count indictment against Mr. Daniel Touby and Mrs. Lyrissa Touby charging violations of (1) 21 U.S.C. § 846 for conspiracy to manufacture a mixture and substance allegedly containing 4-methylaminorex and (2) 21 U.S.C. § 841(a)(1) for manufacturing a mixture and substance allegedly containing 4-methylaminorex.

On March 10, 1989, I heard a battery of pretrial motions regarding certain discovery matters, most of which I disposed of in my March 14, 1989 order upon the parties' agreement and pursuant to certain constitutional doctrines and the Federal Rules of Criminal Procedure.

However, three matters remain outstanding: (1) the defendants' motion to exclude certain evidence pursuant to Federal Rules of Evidence, Rules 403 and 404(b);

(2) the defendants' motion to dismiss the indictment; and (3) the defendants' motion to suppress certain evidence garnered in searches of the defendants' residence. As I indicated at the argument on March 10, 1989, Federal Rules of Evidence, Rule 404(b)/403 determinations are more properly evaluated during trial where probative value and purpose fully crystallize, rather than now, a more formative time in the litigation. Hence, I am left today to decide the defendants' motion to dismiss the indictment and to suppress evidence. Let me first turn to the motion to dismiss the indictment.

MOTION TO DISMISS

The defendants challenge the constitutionality of the no-judicial review provision of 21 U.S.C. § 811(h)(6) and the constitutionality of Congress' delegation of power under 21 U.S.C. § 811(h) to the Attorney General to temporarily designate, as substances in the rubric of federal criminal drug abuse and control laws, substances such as 4-methylaminorex. The defendants also challenge the Attorney General's subdelegation of this power to temporarily schedule 4-methylaminorex to the Administrator of the Drug Enforcement Agency (DEA) as beyond the power that Congress permits for subdelegation of the Attorney General's authority to subordinates. Therefore, the defendants assert that the DEA's temporary scheduling of 4-methylaminorex as a Schedule I substance subject to certain prohibitions and penalties under federal anti-drug laws is invalid. The defendants thus conclude that since their indictments are based on a temporary scheduling of a substance made contrary to law, I must dismiss the indictment against them. The government contests these arguments.

A. Background

Some background is necessary regarding *permanent* and *temporary* scheduling of substances, before I can

properly assess the defendants' request for dismissal of the indictment.

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1236, which is now incorporated into the Controlled Substances Act ("CSA"), *codified, as amended*, at 21 U.S.C. §§ 801-904. In the CSA, Congress established that certain "controlled substances" would be placed in different "schedules" with penalties for violations of the law varying according to the scheduling of the substance. For instance, a Schedule I substance is one that has a high potential for abuse, has no accepted medical use in treatment in the United States, and has a lack of accepted safety for use of the substance under medical supervision. A Schedule V substance has a low potential for abuse relative to scheduled substances I through IV, has a currently accepted medical use in treatment in the United States and its abuse may lead to limited dependence relative to the drugs on Schedules I through IV. *See* 21 U.S.C. § 812(b)(1) & (5). The penalty for a violation involving a Schedule I substance is therefore greater than the penalty for a violation involving a Schedule V substance. *See* 21 U.S.C. § 841.

Congress scheduled a number of substances itself, but also authorized the Attorney General to permanently schedule substances, transfer between schedules, or remove a substance from a schedule. *See* 21 U.S.C. § 811 (a). Congress restrained the Attorney General's exercise of this delegated scheduling power by providing certain safeguards in the statute. For instance, the Attorney General must find that the substance has "potential for abuse" and consider the following with respect to each substance proposed to be controlled:

(1) its actual or relative potential for abuse;

(2) scientific evidence of its pharmacological effect, if known;

(3) the state of current scientific knowledge regarding the drug or other substance;

(4) its history and current pattern of abuse;

(5) the scope, duration, and significance of abuse;

(6) what, if any, risk there is to the public health;

(7) its physchic or physiological dependence liability; and

(8) whether the substance is an immediate precursor of a substance already controlled under this subchapter. *Id.* § 811(c).

Under § 811(b), the Attorney General must also obtain a "scientific and medical" evaluation of the substance from the Secretary of Health and Human Services. If the Secretary recommends that the Attorney General should not schedule the substance, then the Attorney General must adhere to that recommendation. *Id.* § 812(b). Moreover, the Attorney General's rulemaking as to the permanent scheduling decision of any particular substance must conform to the Administrative Procedure Act ("APA"), *codified at* 5 U.S.C. §§ 551-559, making the rule on a record and with notice and opportunity for a hearing to interested parties. *See* 21 U.S.C. § 811(a).

In 1973, pursuant to 21 U.S.C. § 871(a) ("The Attorney General may delegate any of his functions under this subchapter to any officer or employee of the Department of Justice."), the Attorney General subdelegated performance of his functions delegated to him by Congress under the CSA to the DEA administrator. *See* 28 C.F.R. § 0.100(b).

With the passage of time, it became obvious to Congress that the mechanism of permanent scheduling by the Attorney General, even when given a "high priority," was taking six months to a year. S.Rep. No. 225, 98th Cong., 2d Sess. 264, *reprinted in* 1984 U.S.Code Cong. & Ad-

min.News 3182, 3446. Congress therefore reckoned that: "[d]uring the interim between identification of a drug that presents a major abuse problem and the eventual scheduling of the substance, enforcement actions against traffickers are severely limited and a serious health problem may arise." *Id.* at 264, *reprinted in* 1984 U.S.Code Cong. & Admin.News at 3446.

Mindful of this problem, in 1984 Congress amended the CSA to permit the Attorney General to schedule substances, on a temporary basis, to "avoid an imminent hazard to the public safety." 21 U.S.C. § 811(h)(1). Specifically, the relevant part of the amendment provided that:

(1) If the Attorney General finds that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to the requirements of subsection (b) of this section relating to the Secretary of Health and Human Services, schedule such substance in schedule I if the substance is not listed in any other schedule in section 812 of this title or if no exemption or approval is in effect for the substance under section 355 of this title. Such an order may not be issued before the expiration of thirty days from—

(A) The date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, and

(B) the date the Attorney General has transmitted the notice required by paragraph (4).

(2) The scheduling of a substance under this subsection shall expire at the end of one year from the date of the issuance of the order scheduling such substance, except that the Attorney General may, during the pendency of proceedings under subsection (a)(1) of this section with respect to the substance, extend the temporary scheduling for up to six months.

(3) When issuing an order under paragraph (1), the Attorney General shall be required to consider, with respect to the finding of an imminent hazard to the public safety, only those factors set forth in paragraphs (4), (5), and (6) of subsection (c) of this section, including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution.

(4) The Attorney General shall transmit notice of an order proposed to be issued under paragraph (1) to the Secretary of Health and Human Services. In issuing an order under paragraph (1), the Attorney General shall take into consideration any comments submitted by the Secretary in response to a notice transmitted pursuant to this paragraph.

(5) An order issued under paragraph (1) with respect to a substance shall be vacated upon the conclusion of a subsequent rulemaking proceeding initiated under subsection (a) of this section with respect to such substance.

(6) An order issued under paragraph (1) is not subject to judicial review.

21 U.S.C. § 811 (h).

The Senate Report supporting the amendment differentiated the temporary scheduling provision from the permanent one as follows:

Under new subsection (h), the Attorney General would be permitted to control a substance on a temporary basis without meeting the prior notice and hearing requirements of 21 U.S.C. § 811(a) or the Department of Health and Human Services' evaluation requirement of 21 U.S.C. § 881(b) [811(b)], if such action was "necessary to avoid an imminent hazard to the public safety." In issuing a temporary ruling under this new provision, the Attorney General would be required to consider only those factors set out in 21 U.S.C. § 811(c)(4), (5) and

(6) which relate to the history, current pattern, scope, duration and significance of abuse of the substance, and the risk it poses to the public health. New subsection (h)(1) specifically focuses attention on actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or marketing.

S.Rep. No. 225, 98th Cong., 2d Sess. at 264, *reprinted in* 1984 U.S.Code Cong. & Admin.News at 3446.

Congress hoped that the temporary scheduling measure would allow the Attorney General to respond with more alacrity to the menace to the public from drug abuse. Congress recognized that illicit drug traffic was moving too fast to be handled by the permanent scheduling procedures.

The legislative history recognized that:

Law enforcement considerations and the need to protect the public may require action that cannot await the exhaustive medical and scientific determinations ordinarily required when a drug is being considered for control. The emergency control amendment of section 506 [21 U.S.C. section 811(h)] permits such action on a temporary basis until the more extensive scheduling procedures required under current law can be met. S.Rep. No. 225, 98th Cong., 2d Sess. at 265, *reprinted in* 1984 U.S.Code Cong. & Admin.News at 3447.

With this new emergency power in hand, the Attorney General executed the following regulation on July 1, 1987 providing that: "Functions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act, as amended" were assigned to, to be conducted by, handled and supervised by the DEA administrator. 28 C.F.R. § 0.100(b). This "subdelegation" from the Attorney General to the DEA administrator specifically included "functions which may be vested in the Attorney General in subsequent amendments to the Comprehensive Drug Abuse Prevention and Control Act of

1970, and not otherwise specifically assigned or reserved by him." *Id.*

On August 13, 1987, the DEA Administrator noticed his intent to temporarily schedule 4-methylaminorex as a Schedule I substance. 52 Fed.Reg. 30174 (August 13, 1987). In so doing, the DEA Administrator acknowledged his power to temporarily schedule substances which the Attorney General delegated to the Administrator under 28 C.F.R. § 0.100. *Id.* The administrator reasoned that it was necessary to schedule this substance because it was "an imminent hazard to the public safety." *Id.* The administrator explained that: "2-amino-4-methyl-5-phenyl-2-orazoline [4-methylaminorex] is a new substance that is clandestinely produced, that is distributed in the illicit [drug traffic], and that produces stimulant effects." *Id.* The substance was like an amphetamine, "a potent central nervous system stimulant." Depending on the dosage, it could increase blood pressure, cause increased alertness, or, in greater quantities end in seizures, loss of consciousness, respiratory depression, or death. *Id.* Reviewing its pharmacological studies, the DEA Administrator concluded the substance had "a low margin of safety." *Id.* Citing the three factors necessary to assess scheduling under 21 U.S.C. § 811(h), the DEA Administrator temporarily placed the substance in the Schedule I category. *Id.* at 30175. The DEA Administrator also noted that 4-methylaminorex was a substance with no currently approved medical use or manufacture in the United States. *Id.*

On October 15, 1987, the DEA Administrator issued an order temporarily scheduling 4-methylaminorex for a year. *See* 52 Fed.Reg. at 38225-26 (October 15, 1987). The DEA Administrator, with the Secretary's concurrence, issued a notice of a proposed rulemaking to permanently schedule the substance as a Schedule I substance upon expiration of this one-year period. Under separate notice, the DEA Administrator extended the temporary

scheduling period for an additional six months, as permitted under the statute. *See* 53 Fed.Reg. 40061 (October 13, 1988).

As I related earlier, Mr. Touby and Mrs. Touby were indicted for the alleged manufacture and conspiracy to manufacture 4-methylaminorex. The Toubys challenge the validity of the temporary scheduling of this substance.

First, they assert that the statute provides no judicial review of the Attorney General's exercise of discretion and is therefore unconstitutional. Second, they state that Congress articulated no "intelligible principles" by which to guide the Attorney General in the exercise of his authority under Section 811(h), thereby violative of the constitutional doctrine of delegation. Rather, the directions are too vague and malleable. Third, the defendants contend that the Attorney General's subdelegation of power to the DEA administrator was not provided by statute. Fourth, the defendants observe that the Attorney General's action subjects individuals to enormous criminal sanctions. This fourth "argument" is merely a consideration in assessing the other three arguments. I do not find merit in any of the three substantive arguments advanced by the defendants.

B. No-Judicial Review

21 U.S.C. § 811(h)(6) states that "[a]n order issued under [§ 811(h)(1)] is not subject to judicial review." In *United States v. Emerson*, 846 F.2d 541, 544-46 (1988), the United States Court of Appeals for the Ninth Circuit held that absent "clear and convincing" evidence that Congress intended to preclude constitutional review of temporary scheduling orders, § 811(h)(6) did not preclude constitutional review of a temporary scheduling order by the judiciary. *Id.* at 544. Therefore, the defendants' argument that § 811(h) is invalid for lack of constitutional review is unavailing because constitutional review of orders exists.

As for judicial review of the Attorney General's compliance with the relevant statutory requirements, the Ninth Circuit did not decide what amount of statutory review was available. *See id.* (*citing United States v. Caudle*, 828 F.2d 1111, 1112 (5th Cir. 1987) (the DEA's failure to issue a separate order scheduling a certain substance after the 30-day period after notice of intent was given invalidated the scheduling for failure to provide the exact statutory procedure—indicating that some statutory review is available)). In *Emerson*, the Ninth Circuit did hold, however, that there was no constitutionally imposed requirement of judicial review to ensure compliance with statutory standards. *Id.* at 545. The court explained that if judicial review for compliance with statutory standards was the requirement, then such requirement would directly contravene decisions denying statutory review of the executive's exercise of legislatively delegated powers. *Id.* (*citing, e.g., Block v. Community Nutrition Inst.*, 467 U.S. 340, 348, 104 S.Ct. 2450, 2455, 81 L.Ed.2d 270 (1984); *Heckler v. Chaney*, 470 U.S. 821, 838 (1985); *Rosen v. Walters*, 719 F.2d 1422, 1423 (9th Cir. 1983) (all decisions denying availability of judicial statutory review)).

Following the Ninth Circuit's reasoning, I find no impediment to the temporary scheduling procedure based on whatever constraint it places on statutory review of the Attorney General's order to temporarily schedule a substance. Since there is constitutional review of the scheduling and since there is no constitutional requirement for statutory review, the judicial-review argument cannot aid the defendants' case for dismissal of the indictment.

C. Delegation

As to the defendants' second argument, regarding delegation—namely, that Congress has not provided the Attorney General with "intelligible principles" to which the Attorney General can conform his exercise of his dele-

gated authority—the United States Supreme Court's recent decision in *Mistretta v. United States*, —— U.S. ——, 109 S.Ct. 647, 655, 102 L.Ed.2d 714 (1989), the "sentencing guidelines" case, provides guidance.

As the *Mistretta* court observed: "the nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of government." *Id.* 109 S.Ct. at 654. Only Congress legislates, *see* U.S. Const., Art. I, Section I, but in a nation that is far more complex than the one that the Framers encountered in 1789, Congress would not be able to carry out its duties were it to be constitutionally compelled to consider every situation arising from a particular policy. *See, e.g., American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946). Hence, delegation of authority has become a necessity for the efficient administration of our government. However, there must be a control on Congress' ability to delegate, for there is a difference between delegation of legislative power and abdication of constitutional duty to make the law.

In *Mistretta*, the Court again recognized the main check on Congress' delegation of legislative power to a non-legislative branch stating that so long as Congress "shall lay down by legislative act an *intelligible principle* to which the person or body authorized [to exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at ——, 109 S.Ct. at 654 (emphasis added) (*quoting J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 352, 72 L.Ed. 624 (1928)).

Distilling *Mistretta*, the following factors satisfy the constitutional requisite of statutory "intelligible principles" necessary to guide the delegate:

Congress should:

(1) provide the delegate with goals and specify the objects that the delegate must keep in mind in pursuing the goals that Congress enunciates, 109 S.Ct. at 655;

(2) describe the final product of the delegation, *see id.* at 656;

(3) offer specific factors for the delegate to consider in achieving the final product, *see id.* at 656; and

(4) place limitations on the delegated power, *see id.* at 657.

See also American Power & Light Co., supra, 329 U.S. at 105, 67 S.Ct. at 142 (Congress passes the "intelligible-principle" test if it "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." (*quoted in Mistretta, supra*, 109 S.Ct. at 647)). Between the language of § 811(h) itself and the spare, but revealing legislative history of § 811(h), I find that Congress has articulated intelligible principles for the Attorney General to follow in exercising the delegated authority.

First, Congress has set forth its goal of avoiding imminent hazard to the public safety by its delegation of the power to the Attorney General to schedule temporarily certain substances. 21 U.S.C. § 811(h)(1). It further defined this goal when it stated in the legislative history that the bill enabled the Attorney General to respond quickly to rapid illicit traffic of new types of substances; to better enable the authorities to gain the upper hand in the war on drugs. *See* S.Rep. No. 225, 98th Cong., 2d Sess., at 264-65, *reprinted in* 1984 U.S. Code Cong. & Admin.News at 3446-3447.

Second, Congress has described the final product of the delegation. It stated that the delegation should lead to certain substances, specified as dangerous, being included on the schedule of controlled substances. Their manufacture, distribution, or possession would be subject to sanction for a temporary time (one year plus six months) until the Attorney General effected permanent scheduling. *See* 21 U.S.C. § 811(h)(1) & S.Rep. No. 225, 98th Cong., 2d Sess., at 263-65, *reprinted in* 1984 U.S. Code Cong. & Admin.News at 3445-47.

Third, Congress has offered specific factors for the Attorney General to assess in determining the final product. The Attorney General must consider subsections 811(c)(4), (5) and (6), including "actual abuse, diversion from legitimate channels, clandestine importation, manufacture and distribution." 21 U.S.C. § 811(h)(3). While these factors are not as numerous as in the permanent scheduling procedure, they are specific and provide a guide for the delegate to follow.

Fourth, Congress provided specific restraints on the Attorney General's power as to duration of the order, 21 U.S.C. § 811(h)(2), timing of the order after notice of intent to issue the order, *id.* § 811(h)(1); and vacation of the order upon conclusion of a subsequent rulemaking proceeding, *id.* § 811(h)(5). Moreover, as indicated earlier, the order is subject to constitutional review.

In sum, 28 U.S.C. § 811(h) and its legislative history set forth more than the minimum of intelligible principles. Since Congress has outlined the policies giving rise to the delegation, explained what the Attorney General should do and what factors he should consider, and placed limits on this scheduling power, the delegation to the Attorney General is constitutional, adhering to separation of powers doctrine, by satisfying the "intelligible principles test." *See Mistretta*, 109 S.Ct. at 658 (*quoting United States v. Chambless*, 680 F.Supp. 793, 796 (E.D. La. 1988)).

Two pre-*Mistretta* cases have treated the § 811(h) delegation issue, though in brief fashion. In *United States v. Emerson*, *supra*, the Ninth Circuit upheld the delegation, observing that sufficient guidelines and standards accompanied the authority delegated to the Attorney General. The Ninth Circuit observed that: "Section 811(h)'s scheduling criteria are as specific as reasonable practicable to meet the threat to the public safety posed by 'designer drugs,' and to provide the Attorney General with sufficient guidance in scheduling dangerous substances

temporarily." 846 F.2d at 545. For the reasons articulated above, the *Emerson* Court's observance is persuasive and I follow it.

I note, in passing, that in *United States v. Spain*, 825 F.2d 1426 (10th Cir. 1987), which the defendants cite to call the delegation into question, the Tenth Circuit stated that: "The Congressional delegation to the Attorney General is not without doubt as to the adequacy of standards in 811(h), but for these purposes we do not decide but assume it valid." *Id.* at 1429. Since *Spain* held that the DEA lacked authority to schedule temporarily a drug absent *express* subdelegation, the *Spain* Court's observation regarding delegation is mere *dicta*. In view of the outcome of the *Mistretta* test and the Ninth Circuit's observance in *Emerson*, *supra*, I find that the delegation of temporary scheduling power to the Attorney General is not violative of the constitutional doctrine of separation of powers.

D. Subdelegation

The defendants also challenge the subdelegation of temporary scheduling power from the Attorney General to the DEA Administrator. They argue that since the 1984 amendment to the statute containing § 811(h) did not specifically grant the Attorney General the power to subdelegate his delegated authority to the DEA Administrator, the temporary scheduling of 4-methylaminorex, and, consequently, the Touby indictments, must fall. They state that 21 U.S.C. § 871(a), providing that the Attorney General could "delegate any of his functions under the subchapter to any officer or employee of the Department of Justice," 84 Stat. 1270 (1970), cannot be applied to the 1984 amendment and subdelegation cannot be inferred.

The defendants' reading of the relevant statutes is misguided. Whatever the effect of 21 U.S.C. § 871(a), whether it applies to the 1984 amendment or not, it

merely echoes the general mandate concerning the Attorney General's subdelegation of any of his functions which Congress legislated under 28 U.S.C. § 510, an act passed in 1966. 80 Stat. 378, 612 (1966). ("The Attorney General may from time to time, make such provisions as he considers appropriate authorizing the performance by another officer, employee, or agency of the Department of Justice of any function of the Attorney General."). *See United States v. Burnes*, 816 F.2d 1354, 1359 (9th Cir.1987). Hence, it is beyond doubt that the Attorney General possesses the statutory authority to subdelegate his delegated temporary scheduling power.

Another district court from this circuit has recognized the propriety of subdelegation in *United States v. Hovey*, 674 F.Supp. 161, 167 (D.Del.1987). There, Judge Schwartz found that 28 U.S.C. § 510 specifically authorized the Attorney General to subdelegate his § 811(h) power. *Id.* at 167. Although acknowledging the problems with subdelegation in that the temporary scheduling power provided the Attorney General with a wider range of discretion than the permanent scheduling power, the court reckoned that "the lack of legislative history suggesting that subdelegation of temporary scheduling authority should be limited, coupled with the failure of the statutory language to explicitly limit the persons eligible to exercise the authority," led to the conclusion that the Attorney General possessed the power to subdelegate his § 811(h) authority. *Id.* at 168. I agree with Judge Schwartz's observations.

United States v. Giordano, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) dictates no different result. There, the United States Supreme Court was faced with a delegation provision that provided that "[t]he Attorney General, or any Assistant Attorney General specifically designated by the Attorney General, may authorize an application to a federal judge [for] an order authorizing or approving the interception of wire or oral communications . . . ." 18 U.S.C. § 2516(1). A party

other than the Attorney General or a specially designated assistant Attorney General authorized the application. *Id.* at 509-10, 94 S.Ct. at 1823-24. The Court invalidated that authorization, holding that Congress specifically limited the power to those officers designated in the statute. The Court described the interplay between 18 U.S.C. § 2516(1) and 28 U.S.C. § 510, stating:

"[T]he matter of delegation is expressly addressed by Section 2516, and the power of the Attorney General in this respect is specifically limited to delegating his authority to 'any Assistant Attorney General specifically designated by the Attorney General.' Despite Section 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated. Under the Civil Rights Act of 1968, for instance, certain prosecutions are authorized only on the certification of the Attorney General or the Deputy Attorney General, 'which function of certification may not be delegated.' 18 U.S.C. Section 245(a)(1). Equally precise language forbidding delegation was not employed in the legislation before us; but we think Section 2516(1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate." *Giordano*, 416 U.S. at 514. Hence, *Giordano* teaches that Congress must expressly state a limitation on the Attorney General's statutory power to subdelegate, especially in view of Congress' grant of power to the Attorney General to subdelegate under 28 U.S.C. § 510. There being no express limitation in the instant action, the Attorney General has the power to subdelegate his § 811(h) power.

Of course, I note that the subdelegate must be under the same constraints that bind the delegate (which constraints the Administrator followed here, as indicated *supra*). Further, if the delegation does not comply with the "intelligible principles" test, then the subdelegation must fall as well. *See, e.g., Hovey*, 674 F.Supp. at 168.

As *Emerson*, 846 F.2d at 548; *accord United States v. McLaughlin*, 851 F.2d 283, 284 (9th Cir.1988); *Hovey*, 674 F.Supp. at 169; and *United States v. Pees*, 645 F.Supp. 697, 704 (D.Colo.1986) hold, the subdelegation from the Attorney General to the DEA Administrator must be explicit. The *Pees* court explained the reasons for express delegation:

"It is a well-settled point of law that subdelegation of authority from the Attorney General to an administrative agency is a valid authorization of power. . . . The logical and necessary implication of that rule of law is that there must be an *affirmative act* on the part of the Attorney General in which he subdelegates his authority. If the Attorney General were not required to execute an affirmative act in subdelegating his authority, the authority of other administrative agencies *vis. a vis.* the authority of the Attorney General would be hopelessly ambiguous and unworkable. Congress has never manifested an intent to allow administrative agencies to assume, by implication, the powers vested explicitly and exclusively in the Attorney General without the *official* subdelegation of such powers by the Attorney General in a manner subject to recordation and accountability."

Id. at 704 (citation omitted) (emphasis in original). It should also be noted in this regard that explicit subdelegation allows an opportunity for prior review, however lenient, of the propriety of subdelegation. *See Emerson*, 846 F.2d at 548.

Here, the Attorney General expressly subdelegated his power under § 811(h) to the DEA Administrator. *See* 28 C.F.R. § 0.100(b) (July 1, 1987). Thereafter, the Administrator scheduled, on a temporary basis, the substance, 4-methylaminorex. This scheduling was proper because unlike *Emerson* and *Hovey*, the Attorney General expressly delegated the power and *then* the DEA administrator temporarily scheduled 4-methylaminorex.

Further, as I have stated above, the "schedule-makers" (the Attorney General and the DEA Administrators) both received their power to implement the temporary scheduling in a lawful manner. Hence, I find the subdelegation to be entirely proper.

E. Summary

Since defendants' challenge to Section 811(h) based on no-judicial review, improper delegation, and improper subdelegation is without merit, I deny defendants' motion to dismiss the indictment.

THE SUPPRESSION MOTION

On January 5, 1989, the Wanaque police arrested the Toubys on a street in Wanaque, New Jersey, charging them with possession of a forged instrument, theft by deception, possession of marijuana, and possession of drug paraphernalia. In obtaining a search warrant for the Toubys' residence, Detective Sergeant Robert Jordan of the Wanaque Police Department swore out an affidavit upon which the magistrate based his issuance of the warrant.

The affidavit provided in pertinent part:

"On January 5, 1989, Lyrissa Touby and Daniel Touby were arrested in Wanaque, New Jersey, on charges of uttering a forged instrument, theft by deception and possession of marijuana and possession of drug paraphernalia. The arrest resulted from a purchase of a television by the two suspects with a counterfeit cashiers check drawn on the City Federal Bank, Paramus, New Jersey. Defendants were arrested following the purchase of the TV in a motor vehicle. A search, incidental to the arrest, revealed Daniel Touby was in possession of marijuana and drug paraphernalia. Also located in the motor vehicle was a substance Cycocel liquid.

"A check with the FBI lab in Washington, D.C., indicated that Cycocel is a brand name plant stimulator

manufactured by American Cyanimid. In checking with City Federal, it was learned that City Federal does not issue cashiers checks. Further, the account number listed on the check recovered does not match any account number with City Federal.

"Following the arrest of the defendants, Daniel Touby stated they were both in the business of printing T-shirts for rock concerts under the name In Flight Transfers, Inc. It should also be noted that when arrested, Daniel Touby had what appeared to be blue ink on his hands. The color of the blue ink was similar to the blue ink color which appeared on the counterfeit check indicating City Federal dollar sign, then the numbers 2000 and 00 cents.

"A criminal history check revealed that Daniel Touby had been arrested for drug violations (11), forgery and counterfeiting (2), burglary (2), larceny (2) and stolen property (1).

"Detective Wilcox of Morristown P.D. indicated that Daniel Touby has been convicted of the charge of counterfeiting and forgery and numerous drug offenses and is presently awaiting sentencing in Morris County Superior Court. One of the charges in Morristown involved a large number of marijuana plants, according to Detective Wilcox.

"A criminal history check as to Lyrissa Touby shows arrests for drug violations (10), forgery and counterfeiting (2). Detective Wilcox noted Lyrissa Touby was also convicted for drug offenses and forgery and counterfeiting and is awaiting sentencing in Morris County Superior Court.

"The investigation revealed that Lyrissa Touby and Daniel Touby reside at 14—08 River Road, Fair Lawn, New Jersey. The own additional address for the business were two post office boxes in Denville, New Jersey, which have both been closed. The business itself, to the best of the affiant's knowledge, is being operated out of the home.

The affiant believes that the house of Lyrissa Touby and Daniel Touby may contain items used in the crime of counterfeiting and forgery, and various controlled dangerous substances.

"As a result of the investigation conducted, I have reason to believe and do believe that the aforementioned items will be located on the premises."

Officers searched the defendants' residence for dangerous substances and items and equipment used in forging documents on January 6, 1989. Specifically, the warrant indicated that law enforcement officers were looking for "printing equipment, such as plates/stamps used to prepare checks, from City Federal Savings and Loan Association in Paramus, New Jersey, blue printers ink and controlled dangerous substances such as marijuana, marijuana plants and paraphernalia for use of the substances." In the January 6, 1989 search, the police observed more items which were not subsumed under the original search warrant. They swore out another warrant to seize those items on January 7, 1989. The warrant indicated that those items were chemicals, glassware, cookers and other items used in a laboratory.

The defendants argue that I should suppress the evidence seized in the January 6th and January 7th searches because the original search warrant was defective, lacking probable cause. They argue that Detective Jordan's knowledge and information arising from the January 5th arrest "raised no more than a mere suspicion" that additional evidence existed and could be found at the Touby house. The defendants contend that the detective's investigation and his affidavit revealed no facts permitting an inference that evidence of counterfeiting and/or drugs was present at the defendants' home. Defendants further assert that the evidence from the second search be suppressed as a "direct exploitation" of the initial, unlawful search conducted on January 6, 1989. The defendants also contend that the warrant is not within the good-faith

exception to the warrant requirement because Detective Jordan's reliance on the warrant was not objectively reasonable.

I note, in passing, that the defendants, in argument on March 10, 1989, expressly stated that no evidentiary hearing was necessary and that they would rest on their papers.

For its part, the government argues that one could easily draw an inference from the facts of Detective Jordan's affidavit that the defendants' T-shirt business was conducted in the defendants' home, in view of the only additional addresses being post office boxes in Denville, New Jersey. Hence, the government asserts that it was a "short step" in logic to infer that the residence was being used for counterfeiting purposes. The government therefore argues that probable cause for the search existed and, consequently, that I should not suppress the evidence garnered from the two searches.

A. Probable Cause

The Fourth Amendment to the United States Constitution states that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, *but upon probable cause*, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added).

Probable cause is not susceptible of easy definition. It exists where the facts presented in the affidavit are such that a reasonable person would believe that the instrumentalities or evidence of the alleged crime will be found at the place to be searched. *United States v. Tehfe*, 722 F.2d 1114, 1117 (3d Cir.1983), *cert. denied*, 466 U.S. 904, 104 S.Ct. 1679, 80 L.Ed.2d 154 (1984) (*citing*

Zurcher v. Stanford Daily, 436 U.S. 547, 553-60, 98 S.Ct. 1970, 1975-79, 56 L.Ed.2d 525 (1978)); *see also Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

In reviewing a judicial officer's determination of probable cause, the district judge must read and interpret the affidavit in a nontechnical, common sense, and realistic manner. *United States v. Ventresca*, 380 U.S. 102, 108 & 109, 85 S.Ct. 741, 745, & 746, 13 L.Ed.2d 684 (1965). A reviewing court should not undertake a *de novo* review of a judicial officer's determination; rather the court should pay great deference to the initial determination of probable cause by a neutral magistrate. *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1982) (*quoting Spinelli v. United States*, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969)). "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . concluding' that probable cause existed." *Gates*, 462 U.S. 238-39, 103 S.Ct. at 2332-33 (*quoting Jones v. United States*, 362 U.S. 257, 271 (1960)); *see United States v. Kepner*, 843 F.2d 755, 762 (3d Cir.1988); *United States v. Vastola*, 670 F.Supp. 1244, 1270 (D. N.J.1987). However, reviewing courts should not simply rubber stamp magistrate's conclusions. *See, e.g., Tehfe, supra*, 722 F.2d at 1114.

Here, in assessing whether to grant the first search warrant, the magistrate had before him Detective Jordan's affidavit. The affidavit revealed that the Toubys had a residence and two post office boxes for their business. Clearly, a nontechnical, common sense inference from these facts was that evidence of the counterfeiting and forgery charges and of the charges concerning the substances and their attendant paraphernalia would be found at the Touby residence; the only place, drawing a reasonable inference from the affidavit, where such materials could be stored. Accordingly, the affidavit pro-

vided the magistrate with a substantial basis for concluding that a reasonable person would believe that the instrumentalities or evidence of the Toubys' alleged crimes would be found at the Touby residence. I will, therefore, deny the defendant's motion to suppress the evidence from these searches since I find that the first warrant issued upon probable cause.

I note, in passing, that the defendants have not independently questioned the propriety of the second search, apart from its alleged taint by way of the initial search. I observe that, were this point in issue, there was probable cause for the second search based on Detective Jordan's January 7th affidavit that hazardous materials and paraphernalia were present at the Touby residence based on the observations made during the first search.

B. Good-Faith Exception

I note further that even if there was no probable cause to support the searches, I still would not grant the defendants' request to suppress the evidence from the two searches. Under *United States v. Leon*, 468 U.S. 897, 920, 104 S.Ct. 3405, 3419, 82 L.Ed.2d 677 (1984), suppression is not required where "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope."

Leon requires suppression:

(1) where the affiant intentionally or recklessly misleads the magistrate; or

(2) where the magistrate abandons his or her objective judicial role; or

(3) where the affidavit is so lacking in probable cause that an officer could not reasonably rely on the warrant; or

(4) where the warrant utterly fails to meet particularization standards.

Id. at 923, 104 S.Ct. at 3421; *Vastola*, 670 F.Supp. at 1270.

The defendants rely on prongs one and/or three in their argument against the good-faith exception. Neither one of these contentions are persuasive. The defendants have not shown that Detective Jordan intentionally or recklessly misled the magistrate nor that the affidavit lacked indicia of probable cause.

The information in the affidavit, indicating that defendants had only a home address and no other business address, with the exception of certain post office boxes plus prior similar offenses and the detective's observations linking him to the counterfeiting and forgery offenses, was sufficient indicia of probable cause and easily demonstrates that Detective Jordan was neither intentionally nor recklessly misleading the magistrate. Detective Jordan conducted his duties in a diligent and reasonable fashion; just the conduct which *Leon* was meant to protect. *See* 468 U.S. at 921, 104 S.Ct. at 3419 ("Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." (footnote omitted)).

I note that if the second search was independently, not derivatively, at issue, I would find that that search was under the good-faith exception as well, because the defendants have not shown intentional or reckless misleading of the magistrate as to the second search, nor that there was not indicia of probable cause for the second search.

Hence, even were I not to find that probable cause existed, I would not suppress the evidence garnered from the two searches because the searches fall, four-square, within the good-faith exception articulated in *Leon*, *supra*.

C. Summary

I deny the defendants' motion to suppress the evidence of the searches because the magistrate properly found probable cause to support the warrant. I further note that the searches would fall within the *Leon* good-faith exception.

CONCLUSION

In conclusion, I deny defendants' motions to dismiss the indictment and to suppress the evidence from the searches.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5604

UNITED STATES OF AMERICA

v.

DANIEL TOUBY,

Appellant

On Appeal from the United States
District Court for the
District of New Jersey

(D.C. Criminal No. 89-00006-01)

No. 89-5605

UNITED STATES OF AMERICA

v.

LYRISSA TOUBY,

Appellant

On Appeal from the United States
District Court for the
District of New Jersey

(D.C. Criminal No. 89-00006-02)

Argued January 23, 1990

Before: SLOVITER, HUTCHINSON, and
COWEN, *Circuit Judges*

(Opinion filed July 27, 1990)

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

Defendants, who were convicted of conspiracy to manufacture and the manufacturing of a substance which was temporarily designated as a Schedule I controlled substance, contend that the statutory delegation to the United States Attorney General of the power to temporarily schedule drugs is unconstitutional and that his subdelegation of that power by regulation to the Drug Enforcement Agency (DEA) is unauthorized.

I.

Background

Defendants Daniel and Lyrissa Touby, husband and wife, were arrested January 6, 1989 at their home in Fair Lawn, New Jersey, and charged with conspiring to manufacture and knowingly and intentionally manufacturing 4-methylaminorex, a Schedule I controlled substance, in violation of 21 U.S.C. § 841(a)(1) (1988) and 21 U.S.C. § 846 (1988). 4-methylaminorex, a stimulant referred to as Euphoria, was placed on Schedule I by the DEA Administrator on October 15, 1987 pursuant to the temporary scheduling provisions of 21 U.S.C. § 811(h) (1988). The Toubys filed a pretrial motion to dismiss the indictment challenging the temporary scheduling of Euphoria, which the district court denied.

Daniel and Lyrissa Touby were convicted following a jury trial and sentenced to forty-two and twenty-seven months' imprisonment, respectively. Defendants filed a timely appeal and now renew their attack on the temporary scheduling process and on the sufficiency of the evidence as to Lyrissa Touby, an issue raised by her in a motion for a judgment of acquittal pursuant to Fed.R. Crim. P. 29, and rejected by the district court. In addition, Daniel Touby has raised certain other contentions in his pro se brief.

We turn first to the issue of the constitutionality of the delegation and subdelegation of the temporary scheduling power.

II.

The Delegation Issues

A.

Statutory Background

In setting forth the background and legislative history of both the permanent and temporary scheduling provisions, we borrow liberally from the opinion of Judge Ackerman of the district court. *See* 710 F. Supp. 551, 552-55 (D.N.J. 1989).

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970); Title II of that Act is known as the Controlled Substances Act (CSA) (current version at 21 U.S.C. §§ 801-904 (1988)). The statute provides for placement of certain controlled substances on five different schedules. Scheduling a drug effectively criminalizes its use, manufacture and distribution, and determines the nature of the offense and the length of the sentence that may be imposed. The schedules range from Schedule I, listing substances that have a high potential for abuse, no accepted medical use in treatment in the United States, and a lack of accepted safety for use of the substance under medical supervision, to Schedule V, listing substances with a relatively low potential for abuse, a currently accepted medical use in treatment in the United States, and abuse of which may lead to limited dependence relative to the drugs on Schedules I through IV. *See* 21 U.S.C. § 812(b)(1), (5). The penalties vary accordingly.

The statute lists certain substances on each of the five schedules, but also provides that the Attorney General can add substances to the schedules, remove some, and transfer between the schedules. *See* 21 U.S.C. § 811(a).

The statute circumscribes the Attorney General's power to add substances in several respects. First, it lists the factors that must be considered for each substance proposed to be controlled, *i.e.*, (1) its actual or relative potential for abuse; (2) scientific evidence of its pharmacological effect, if known; (3) the state of current scientific knowledge regarding the drug or other substance; (4) its history and current pattern of abuse; (5) the scope, duration, and significance of abuse; (6) what, if any, risk there is to the public health; (7) its psychic or physiological dependence liability; and (8) whether the substance is an immediate precursor of a substance already controlled under this subchapter. *Id.* § 811(c). Second, the statute requires that the Attorney General obtain a "scientific and medical" evaluation of the substance from the Secretary of Health and Human Services, which is binding if the Secretary recommends that the Attorney General should not schedule the substance. *Id.* § 811(b). Finally, before adding a substance to the schedules, the Attorney General must follow the notice and hearing provisions of the Administrative Procedure Act (APA), codified at 5 U.S.C. §§ 551-559, 21 U.S.C. § 811(a).

In 1973, pursuant to 21 U.S.C. 871(a), the Attorney General promulgated a regulation subdelegating performance of the functions delegated to him by Congress under the CSA to the DEA Administrator. *See* 28 C.F.R. § 0.100(b) (1986).[1]

Because the process of permanent scheduling contained an inevitable lag time, Congress amended the CSA in 1984 to permit the Attorney General to schedule substances on a temporary basis to "avoid an imminent hazard to the public safety" after consideration of those

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[1] Section 871(a) provides:

> The Attorney General may delegate any of his functions under this subchapter to any officer or employee of the Department of Justice.

21 U.S.C. § 871(a).

factors set out in 21 U.S.C. § 811(c)(4), (5) and (6), which relates to the history, current pattern, scope, duration and significance of abuse of the substance, and the risk it poses to the public health. 21 U.S.C. § 811(h)(1), (3). There is to be notice of the Attorney General's intention to temporarily schedule a substance published in the Federal Register and transmitted to the Secretary of HHS, whose comments must be taken into consideration. *Id.* § 811(h)(4). The duration of temporary scheduling of a substance is limited to one year with a possible extension up to six months. *Id.* § 811(h)(2).

The Attorney General amended the subdelegation regulation on July 1, 1987, assigning to the DEA Administrator the "[f]unctions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended." 28 C.F.R. § 0.100(b) (1989). Thereafter, the DEA Administrator gave notice of his intention to temporarily schedule 4-methylaminorex as a Schedule I substance. 52 Fed. Reg. 30,174 (1987). The Administrator stated that the drug was a new and potent central nervous system stimulant that is clandestinely produced which can cause seizures, loss of consciousness, respiratory depression and death. *Id.* He concluded that the substance posed "an imminent hazard to public safety" and met the three criteria for temporary scheduling. *Id.* at 30,174-75. Three months later, the DEA Administrator issued an order temporarily scheduling 4-methylaminorex on Schedule I for a year. *See* 52 Fed. Reg. at 38,225-26 (1987). Concurrently, the DEA Administrator issued a notice of proposed rulemaking to place the substance permanently on Schedule I at the end of the one-year temporary period. 53 Fed. Reg. 40,390 (1988). The following year, the DEA Administrator extended the temporary scheduling for six months. *See* 53 Fed. Reg. 40,061 (1988).

B.

Jurisdiction

As an initial matter, we consider the effect on our jurisdiction of the provision of the statute that an order issued under section 811(h)(1) (the temporary scheduling section) "is not subject to judicial review." 21 U.S.C. § 811(h)(6). Although the government's position is that jurisdiction exists and defendants do not address the issue, it is axiomatic that "this court has a 'special obligation' to satisfy itself of its own jurisdiction." *McNasby v. Crown Cork and Seal Co.*, 832 F.2d 47, 49 (3d Cir. 1987) (citing *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986)), *cert. denied*, 485 U.S. 936 (1988), as well as the jurisdiction of the court under review. *Pomper v. Thompson*, 836 F.2d 131, 132 (3d Cir. 1987).

When constitutional questions are at issue, "the availability of judicial review is presumed and [courts] will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." *Califano v. Sanders*, 430 U.S. 99, 109 (1977). Nothing in the legislative history of the statute suggests that Congress meant to prevent those facing criminal charges to be foreclosed from attacking the constitutionality of the delegation of power to temporarily schedule drugs contained in section 811. Every court that has considered whether section 811(h)(6) precludes consideration of the constitutionality of the delegation of the power to temporarily schedule drugs under section 811 has explicitly or implicitly concluded that constitutional review is not precluded. *See United States v. Emerson*, 846 F.2d 541, 544 (9th Cir. 1988); *United States v. Spain*, 825 F.2d 1426 (10th Cir. 1987); *United States v. Hovey*, 674 F. Supp. 161 (D.Del. 1987); *United States v. Pees*, 645 F. Supp. 697 (D.Colo. 1986). We agree with these courts that, whatever the import of the limitation on judicial

review, it does not extend to review of constitutional challenges.

C.

Analysis

Defendants raise what is in essence a facial challenge to the temporary scheduling provision. Although at oral argument their counsel stated that this was also an as-applied challenge, defendants do not contend that Euphoria cannot be scheduled as a Schedule I narcotic or that the temporary scheduling of the substance did not meet the standards set forth in 21 U.S.C. § 811(h). Accordingly, we look only to the face of the statute and not at the particular properties of Euphoria or the justifications given by the DEA Administrator for its temporary scheduling.[2]

Defendants' delegation challenge raises three distinct questions: first, whether Congress' delegation to the Attorney General of the power to temporarily schedule was constitutional; second, whether the Attorney General was authorized by Congress to subdelegate this power to the Administrator of the DEA; and third, whether the Attorney General properly exercised his authority to subdelegate the power to the DEA.

1. *Delegation to Attorney General*

Article I, section 1 of the Constitution provides that "[a]ll legislative powers herein granted shall be vested

[2] We do not foreclose the possibility that a defendant could raise, as a matter of due process, the defense that a substance was improperly scheduled because it does not fit within the standards that Congress established. Arguably, such a defense might be raised by a defendant who was convicted for manufacture, distribution or possession of a temporarily scheduled drug that was later removed from the schedule because it did not meet the criteria for permanent scheduling of prohibited substances. *See* United States v. Pees, 645 F. Supp. 697 (D. Colo. 1986) (after Ecstacy-MDMA was temporarily placed on Schedule I, administrative law judge ruled it could not be permanently placed on Schedule I or II).

in a Congress of the United States." U.S. Const. art. I, § 1. This section "is both a grant of power to the Congress and limitation upon its use." R. Pierce, S. Shapiro, P. Verkuil, Administrative Law & Process 51 (1985). Congress may not delegate its legislative power to others. Although commentators have noted the dormancy of the non-delegation doctrine, *see, e.g.*, 1 K. Davis, Administrative Law of the Eighties §§ 3.1-1 to 3.1-3 (Supp. 1989); 1 J. Stein, G. Mitchell, B. Mezines, Administrative Law § 3.03[4] at 3-102 to 3-104 & n.84 (1988) [hereinafter cited at J. Stein], the Supreme Court recently reaffirmed its vitality in *Mistretta v. United States*, 109 S. Ct. 647 (1989).

The Court reiterated the long-established principle that " 'the integrity and maintenance of the system of government ordained by the Constitution,' mandate that Congress generally cannot delegate its legislative power to another Branch." *Id.* at 654 (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)). However, the Court also emphasized that the Constitution does not prohibit Congress from obtaining assistance from coordinate branches. *Mistretta*, 109 S. Ct. at 654. Thus, Congress may delegate authority to a coordinate branch when it lays "down by legislative act an *intelligible principle* to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Id.* (quoting *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (emphasis added). The Court described its application of this general rule as having "been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." 109 S. Ct. at 654.

In *Mistretta* the Court considered, *inter alia*, the constitutionality of Congress' delegation to the Federal Sentencing Commission of the power to promulgate the Federal Sentencing Guidelines. The Court upheld the delegation because Congress specified the goals the Commission must aim for, the final product of the delegation, specific factors the Commission must consider, and limits on the Commission's power. *Id.* at 655-57. These four factors are relevant but not exclusive. Other factors the Court has identified when determining whether delegation is proper are the availability of judicial review, *see Carlson v. Landon*, 342 U.S. 524, 542-44 (1952), the rapidity of changes in the matter being regulated, *see Yakus v. United States*, 321 U.S. 414, 432 (1944), the complexity of the field, *see Mistretta*, 109 S. Ct. at 654, and the existence of "well-known and generally acceptable standards" in the field being regulated, *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947).

In applying the "intelligible principle" test, the Court has given Congress wide latitude in delegating its powers. With the exception of the two 1935 cases invalidating statutes as unconstitutional delegations of power, *see Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court has upheld every congressional delegation of power that has been presented to it, even where Congress has provided negligible standards for the delegatee to follow. *Mistretta*, 109 S. Ct. at 655; 1 J. Stein at § 3.03[3] at 3-84 to 3-85.

Defendants argue that a more stringent non-delegation analysis applies when, as in this case, the delegatee is empowered to create crimes. They point out that both *Panama Refining* and *Schechter Poultry* involved a delegation of authority to criminalize activity.

The issue in *Panama Refining* involved the validity of Congress' delegation to the President in the National Industrial Recovery Act (NIRA) of authority to prohibit the interstate transport of petroleum produced or withdrawn from storage in violation of state law. The Court struck down the delegation because the statute did not

declare any policy as to the transportation of the excess production, did not qualify the President's authority, and did not establish any criterion "to govern the President's course," 293 U.S. at 415. In *Schechter Poultry*, the Court considered another provision of the NIRA authorizing the President to approve codes of fair competition emanating from industry groups or which were prescribed by the President himself. 295 U.S. at 521-22. Violation of the codes was a crime. The Court found that Congress overstepped its power to delegate because it failed to establish the standards of legal obligation, leaving that decision to the President or the trade or industry involved. *Id.* at 541-42.

There is language in subsequent cases which focuses on the fact that both of these cases involved criminal conduct. In *Fahey v. Mallonee*, 332 U.S. 245 (1947), the Court upheld the delegation of the terms by which conservators could be appointed for savings and loan associations, noting that the "discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields." *Id.* at 250. The Court commented that both *Schechter Poultry* and *Panama Refining* involved the delegation of the power "to make federal crimes of acts which had never been such before and to devise novel rules of law in a field in which there had been no settled law or custom." *Id.* at 249. *See also Mistretta*, 109 S. Ct. at 655 n.7 (commenting that unlike the statutes at issue in *Panama Refining* and *Schechter Poultry*, the Sentencing Guidelines do "not make crimes of acts never before criminalized").

However, despite the suggestion in this language that a higher standard of review should be applied when the delegation involves criminal penalties, the Court does not appear to have done so. *See, e.g., Yakus*, 321 U.S. at 426-27 (upholding delegation to Price Administrator of

power to fix maximum prices of commodities and rents even though violation of those prices was criminal). *But see United States v. Robel*, 389 U.S. 258, 274-75 (1967) (Brennan, J., concurring) (area of permissible indefiniteness in delegation narrows where regulation invokes criminal sanctions). This court has previously rejected the argument that a stricter standard for delegation is required when the delegated authority might result in criminal sanctions. *See United States v. Frank*, 864 F.2d 992, 1017 (3d Cir. 1988) (majority of Supreme Court has not "shown any inclination in *Robel* or since, to depart from the holding in *Yakus* . . . which upheld the imposition of a criminal sanction for the violation of an administrative price regulation under the usual delegation test"), *cert. denied*, 109 S. Ct. 2442 (1989).

Finally, even if it were proper to apply a stricter standard in reviewing delegation of the power to create crimes in an "uncharted field," here the area is not "uncharted." The Attorney General has had the power to schedule drugs on a permanent basis since 1970, a power which has been consistently upheld. *See, e.g., United States v. Alexander*, 673 F.2d 287 (9th Cir.), *cert. denied*, 459 U.S. 876 (1982); *United States v. Barron*, 594 F.2d 1345 (10th Cir.), *cert. denied*, 441 U.S. 951 (1979); *United States v. Gordon*, 580 F.2d 827 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978); *United States v. Roya*, 574 F.2d 386 (7th Cir.), *cert. denied*, 434 U.S. 1015 (1978); *United States v. Pastor*, 557 F.2d 930 (2d Cir. 1977).

Judge Hutchinson, in his thoughtful dissent, consistently refers to the power granted to the Attorney General under section 811(h) as the power to "define primary criminal conduct." *See, e.g.*, Dissenting Typescript Op. at 7. We believe that characterization is overstated. It is Congress which has defined "the primary criminal conduct" at issue, by making it unlawful, *inter alia*, to manufacture and possess with intent to to distribute

substances listed on the five schedules. *See* 21 U.S.C. § 841(a)(1). The Attorney General's power encompassed in section 811(h) to schedule a substance on a temporary basis when necessary "to avoid an imminent hazard to the public safety" is limited to scheduling a substance in Schedule 1 only. *See* 21 U.S.C. § 811(h).

Congress has established Schedule I, the most severe of the five schedules, as covering the following:

> (1) Schedule I.—
>
> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
>
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C. § 812(b). Thus, the Attorney General, in placing drugs or substances on Schedule I, is not defining primary criminal conduct but merely designating the drugs or substances which fall within Congress' general description. This is independent of the factors which section 811(h) requires the Attorney General to consider in exercising the delegated temporary scheduling power.

Accordingly, we will apply the general standard enunciated by the Supreme Court and consider whether Congress has provided an intelligible principle to govern the Attorney General's temporary scheduling of a substance pursuant to section 811(h). The two courts that have decided the question agree that section 811(h) is a constitutional delegation to the Attorney General. *See Emerson*, 846 F.2d 541; *United States v. Lichtman*, 363 F. Supp. 438 (S.D.Fla. 1986).

In *Mistretta*, the Court looked to the goal Congress charged the delegatee to carry out. In this statute, that

goal is explicit: "to "avoid an imminent hazard to the public safety." 21 U.S.C. § 811(h)(1). The legislative history makes clear that Congress determined that the regular procedures for scheduling drugs were inadequate because clever chemists were able to create "designer drugs" similar to scheduled substances but which contained a slight variation which made the designations on the schedules inapplicable to them. These designer drugs were being developed and widely marketed long before the government was able to schedule them. "During the interim . . . enforcement actions against traffickers are severely limited and a serious health problem may arise." S. Rep. No. 225, 98th Cong., 2d Sess. 264, *reprinted in* 1984 U.S. Code & Admin. News 3182, 3446. Thus, for example, the DEA Administrator justified the temporary scheduling of Euphoria on the ground that its pharmacological profile closely resembles that of an amphetamine, a Schedule I substance, *see* 21 U.S.C. § 812(c), Schedule I(c) (1988), but is not governed by the permanent schedules. 52 Fed. Reg. 30,174 (1987).

The Toubys argue that the statutory delegation to the Attorney General is deficient because it contains inadequate standards. We do not agree. Although the section does not contain as much guidance as is provided for permanent scheduling, it does not leave the Attorney General without any guidance in determining whether a drug poses an imminent hazard to public safety. It requires the Attorney General to consider three specified factors: (1) the history and pattern of abuse, (2) the scope, duration and significance of abuse, and (3) the risk to public health. *See* 21 U.S.C. § 811(h). These provide at least as much guidance as the "public convenience, interest, and necessity" standard upheld as the basis for FCC regulations, *see National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943), or the "excessive profits" standard used in the wartime Renegotiation Act as the basis for administrative officials to renegotiate

supply contracts, *see Lichter v. United States*, 334 U.S. 742, 783-87 (1948). Furthermore, the five additional factors which the Attorney General must consider when effecting a permanent scheduling at least provide a useful guide for the exercise of the temporary scheduling function. *See Fahey*, 332 U.S. at 250 (existence of related statutes and well-defined practices in field relevant to constitutionality of delegation).

Finally, the Attorney General's power to schedule substances is not unlimited.[3] The maximum duration for the temporary scheduling of a substance is 18 months. In fact, the temporary scheduling power can be viewed as preliminary to and in aid of the permanent scheduling authority as set forth in section 811(a).

Not surprisingly, because the provision for temporary scheduling is designed to allow for faster scheduling, it has fewer criteria and procedural requirements. It would defeat the congressional goal of fast responsive action to the emergence of designer drugs if temporary scheduling were to require the same degree of detailed preliminary procedure that must precede permanent scheduling.

Congress has described the temporary scheduling provisions as an "emergency control." S. Rep. 225, 98th Cong., 2d Sess. at 265, *reprinted in* 1984 U.S. Code & Admin. News at 3447. Section 811(h) was Congress' response to the rapid development and distribution of illicit drugs in ways that cannot always be foreseen and with results that are often devastating to individuals and to our society. Under these circumstances, it was reasonable for Congress to broadly delegate special authority to the Attorney General, particularly when the delegation permits scheduling to be effective only for a limited period of time. *See Emerson*, 846 F.2d at 545; *Lichter*, 334

[3] The Toubys' suggestion that the Attorney General, in his unlimited discretion, could schedule alcohol or tobacco is farfetched. These substances are exempted from the Act. 21 U.S.C. § 802(6).

U.S. at 785 (Congress need not supply specific formula in a field where adaptation and flexibility are essential).

The Toubys contend that even if Congress has provided adequate guidance to the Attorney General, the lack of the procedural protections of the Administrative Procedure Act, which include notice, public hearings, and a comment period, *see* 5 U.S.C. § 553 (1988), compounded by the statutory limit on judicial review, is fatal to the constitutionality of the delegation. It is true that the full panoply of APA procedures is not required for temporary scheduling, but the Attorney General must file a notice in the Federal Register of intent to schedule the substance and wait thirty days before the temporary scheduling takes effect. This is not an insignificant protection. It gives an opportunity to persons in the scientific community, chemical or pharmaceutical manufacturers, or other members of the public who believe that a substance about to be temporarily scheduled has significant beneficial public purpose and should not be scheduled, even temporarily, to bring their views to the attention of the Attorney General or his designee within that 30-day period. Assuming that some delegations would not be sustained because of the failure to provide APA-type procedures, we do not think this invalidates the delegation of the temporary scheduling power, in view of the limited duration of the scheduling and the emergency situation it is designed to remedy. *See Emerson*, 846 F.2d at 545.

Nor do we believe that the preclusion of judicial review found in section 811(h)(6) is enough of a basis to find that the delegation is unconstitutional. Judicial review is the usual vehicle by which the executive action is tested to insure that "the will of Congress has been obeyed." *Skinner v. Mid-American Pipeline Co.*, 109 S. Ct. 1726, 1731 (1989) (quoting *Mistretta*, 109 S. Ct. at 658). *See Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (3-judge panel) ("the safeguarding of meaningful judicial review

is one of the primary functions of the [non-delegation] doctrine"); *see also* L. Jaffe, Judicial Control of Administrative Action 261-394 (1965) (arguing availability of judicial review is necessary to validity of administrative action). The availability of judicial review at some appropriate time insures that the discretion of the executive officer to whom power has been delegated cannot be exercised in an unbridled manner. *See Carlson*, 342 U.S. at 542-43.

On the other hand, the preclusion of review of many administrative actions has been upheld by the Supreme Court. *See, e.g., Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984) (consumers may not obtain judicial review of milk market orders issued by Secretary of Agriculture); *Briscoe v. Bell*, 432 U.S. 404 (1977) (Voting Rights Act bars judicial review of Attorney General's determination that preconditions for application of the Act to particular jurisdictions have been met); *Johnson v. Robison*, 415 U.S. 361, 367 (1974) (Congress may preclude review of all unconstitutional attacks on Veteran's Administration's provision of benefits); *see also* 5 U.S.C. § 701(a)(1) (1988) (judicial review under APA unavailable where relevant statute precludes it).

Congress' preclusion of judicial review of the temporary scheduling order is consistent with its intent, reflected in the legislative history, that there be prompt effectuation of such orders. As we have already suggested, *see supra* note 2, this does not necessarily preclude review of the application of the temporary scheduling power in an individual case. Thus, for example, in *Estep v. United States*, 327 U.S. 114 (1946), the Court held that a draftee who faced criminal prosecution for refusal to submit to induction was permitted to raise the defense that the draft board's actions were lawless and outside its jurdisdiction, despite a statutory provision limiting judicial review of the decisions of the local boards. The Court stated, "[w]e cannot readily infer

that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local [draft] boards 'final' as to provide that a citizen of this country shall go to jail for not obeying an unlawful order of an administrative agency." *Id.* at 122.

Indeed, we note that the court in *United States v. Caudle*, 828 F.2d 1111 (5th Cir. 1987), without discussing the provision in section 811(h)(6) limiting judicial review, upheld the dismissal of an indictment charging distribution of a temporarily scheduled drug because the Attorney General had not issued the order temporarily scheduling the drug in accordance with the time limits provided in section 811(h). *See Pees*, 645 F. Supp. at 704 (suggesting limitation on review is unconstitutional).

We hold that the absence of the full array of APA procedures and judicial review at the time of the scheduling order does not invalidate the delegation of the power to temporarily schedule substances given by Congress to the Attorney General. The intelligible principle pursuant to which the Attorney General is to exercise that power is evident from the statute. The standards which the Attorney General is to use and the provision for public notification are sufficient to meet constitutional requirements. Accordingly, we reject the Toubys' challenge to the statutory delegation to the Attorney General provided in section 811(h).

2. *Subdelegation by the Attorney General to the Administrator of the DEA*

The Toubys next challenge the temporary scheduling of Euphoria by the DEA on the ground that the Attorney General has not been authorized by statute to subdelegate his authority to temporarily schedule drugs under section 811(h).

The 1984 amendments to the Controlled Substances Act which provided for temporary scheduling do not include

any specific authorization for the Attorney General to subdelegate his responsibilities under the amendments. Dangerous Drug Diversion Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2068, 2070-71 (1984). The Attorney General relies on two other statutes for this power. One, enacted in 1966 pursuant to a reorganization of the Justice Department, provides that the Attorney General "may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." 28 U.S.C. § 510 (1982). The second, part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. § 871(a)), provides that the "Attorney General may delegate any of his functions under this title to any officer or employee of the Department of Justice." *Id.* at 84 Stat. 1270.

In arguing that the 1966 and 1970 general authorizations of the power to subdelegate are insufficient and that express authorization is required, the Toubys rely on *United States v. Spain*, 825 F.2d 1426 (10th Cir. 1987), where the court, after referring to the "borderline standards in the delegation by Congress to the Attorney General," *id.* at 1429, found that the subdelegation to the DEA was impermissible. However, the issue decided in *Spain* was whether it could be inferred that the Attorney General actually subdelegated his power to the DEA, not whether he had the authority to do so under these statutory provisions. *Id.*

The central inquiry with respect to a subdelegation challenge is whether Congress intended to limit the delegatee's power to subdelegate. *See Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 120-22 (1947); *United States v. Giordano*, 416 U.S. 505, 512-23 (1974). In *Fleming*, the Court held that the Administrator of the Emergency Price Control Act was authorized to delegate

to district directors his power to sign and issue subpoenas pursuant to a general provision of the Act which stated that the Administrator may appoint employees to carry out his functions and duties under the Act and that any duly authorized representative may exercise any and all of the Administrator's powers. 331 U.S. at 120. After examining the language of the Act and its legislative history, the Court found no congressional intent to limit this general authority to subdelegate. *Id.* at 120-22. In the absence of a statutory provision listing certain delegable powers, thereby implicitly excluding others, there was no reason to assume that the subpoena power should be excluded from the general delegation authority. *Id.*

In contrast, in *Giordano*, where the Court held that the Attorney General could not rely on the general delegation provision in 28 U.S.C. § 510 to subdelegate the authority to authorize an application to a federal judge for an order for a wiretap, 416 U.S. at 514, the Court noted that Congress had specified in the Omnibus Crime Control and Safe Streets Act of 1968 the positions of individuals who had that authority, *i.e.*, the Attorney General or any Assistant Attorney General specifically designated by the Attorney General. 18 U.S.C. § 2516 (1). *Giordano*, when read in conjunction with *Fleming*, suggests that the Court will uphold subdelegations by the Attorney General pursuant to 28 U.S.C. § 510, unless there is specific evidence of congressional intent to the contrary. In this case, the Toubys have pointed to no such evidence.

Furthermore, in *Fleming* and *Giordano* the Supreme Court made clear that Congress need not expressly authorize subdelegation when a general subdelegation statute exists. *See Fleming*, 331 U.S. at 121; *Giordano*, 416 U.S. at 513-14. Finally, although the concurrence in *Fleming* mentioned the need for subdelegation of the burdensome and time-consuming function of signing sub-

poenaes, *Fleming*, 331 U.S. at 123-24 (Jackson, J., concurring), it did not suggest that such need is a *sine qua non* to finding authority to subdelegate, and no case so holds. Thus, even if the Toubys were correct in their contention that scheduling does not require expert scientific determinations, a contention we find problematic, that would not lead us to hold that the general authority granted in 28 U.S.C. § 510 is inapplicable here.[4] *See also Hovey*, 674 F. Supp. at 167 (Attorney General is authorized by 28 U.S.C. § 510 to subdelegate his authority to temporarily schedule drugs).

3. *The Exercise of the Attorney General's Subdelegation Power*

The Toubys' final delegation argument is that, in any event, the Attorney General failed to expressly subdelegate his section 811(h) authority Unquestionably, he must do so explicitly in order for the subdelegatee to be empowered to act. *See Greene v. McElroy*, 360 U.S. 474, 506-07 (1959) (where individual liberties are at stake subdelegation must be express). Some background will be useful in our consideration of this issue.

In 1973, the Attorney General subdelegated to the DEA Administrator the performance of the functions delegated to him by Congress under the CSA, including the permanent scheduling of drugs. *See* 28 C.F.R. § 0.100 (b) (1986). However, he failed to expressly subdelegate to the DEA his new power to temporarily schedule after the passage of the 1984 amendments permitting temporary scheduling of drugs. In response to challenges raised by criminal defendants to the authority of the DEA to temporarily schedule drugs in the absence of such an express subdelegation, several courts held that the new statutory authority to temporarily schedule

[4] Because we hold that 28 U.S.C. § 510 alone permits the subdelegation, we need not decide whether 21 U.S.C. § 571 provides an alternative basis for that action.

drugs was equivalent to new legislation rather than a mere amendment, that the 1973 subdelegation could not be read to cover a substantially different power created after the subdelegation was made, that there was no express subdelegation of the new power, and that as a result the DEA's actions were unauthorized. *See Emerson*, 846 F.2d at 548; *Spain*, 825 F.2d at 1429; *Hovey*, 674 F. Supp. at 169-71; *Pees*, 645 F. Supp. at 704.

Apparently in response, in July 1987 the Attorney General promulgated a new version of section 0.100(b) which states that the Attorney General subdelegates to the DEA Administrator "[f]unctions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970, *as amended*. This will include functions which may be vested in the Attorney General in subsequent amendments to the [Act] and not otherwise specifically assigned or reserved by him." 28 C.F.R. § 0.100(b) (1988) (emphasis added). In the comments accompanying the new regulation in the Federal Register, the Department of Justice stated that "[w]hile the Attorney General asserts that any functions granted to him pursuant to [amendments to the Act] were properly delegated to the Administrator of DEA by the 1973 Order, this amendment will ensure that any functions vested in the Attorney General by any statutory amendments to the [Act] are delegated to the Administrator of the [DEA] unless otherwise specifically assigned or reserved by the Attorney General." 52 Fed. Reg. 24,447 (1987).

This is apparently the first case to consider the adequacy of the 1987 regulation to effect a subdelegation.[5]

[5] In *Emerson*, the court noted in a footnote that the government had not relied upon or even mentioned the existence of the new regulation and the court did not consider it. 846 F.2d at 538 n.3. In *Hovey*, the court noted that the regulation did not apply because it was promulgated after the defendant's conviction. 674 F. Supp. at 169 & n.18.

Defendants argue that the new subdelegation is inadequate because it does not specifically refer to section 811(h) and the authority to temporarily schedule drugs. Although the Attorney General's subdelegation must be explicit, it need not mention by name every power it subdelegates. The regulation explicitly subdelegates every power given to the Attorney General by amendments to the Act. Section 811(h) was clearly an amendment to the Act. It was enacted before the 1987 subdelegation and thus was encompassed in the 1987 subdelegation.[6] Accordingly, we hold that the 1987 subdelegation contained in 28 C.F.R. § 0.100(b) was sufficiently precise and express to effectuate a subdelegation of the Attorney General's section 811(h) powers to the DEA Administrator.

To summarize, we hold that the delegation to the Attorney General of the power to temporarily schedule drugs did not violate the non-delegation doctrine. Furthermore, we have determined that the Attorney General was authorized by Congress to subdelegate his temporary scheduling powers to the Administrator of the DEA and that the Attorney General did, in fact, exercise his authority to subdelegate. Accordingly, we reject defendants' contention that their indictments for manufacture of a temporarily scheduled drug must be dismissed.

III.

Sufficiency of the Evidence

Lyrissa Touby argues that there was insufficient evidence to support the jury's finding of her guilt. We must view the evidence in the light most favorable to the government as the verdict winner. *United States v. McNeill*,

[6] We do not decide here whether a broad subdelegation of all powers vested in the Attorney General by all future statutory amendments would be valid if there were an amendment which created new and different powers.

887 F.2d 448, 449-50 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1152 (1990). The principal ingredients of 4-methylaminorex are norephedrine, sodium acetate and cyanogen bromide. Daniel Touby purchased cyanogen bromide from Eastman Kodak Company in September 1988. There was evidence that twice on October 3, 1988 Lyrissa Touby picked up from General Laboratory Supplies boxes, wrapped in plain paper, containing sodium acetate, sodium carbonate, potassium carbonate and norephedrine hydrochloride pursuant to orders called in by a man who identified himself as "Dan." She signed receipts itemizing the chemicals purchased and told a company employee that the chemicals were being used to adhere decals to T-shirts. No evidence was presented at trial that the chemicals could be used for that purpose.

When the Toubys were arrested, DEA agents and New Jersey police found a laboratory in their bedroom containing a plexiglass hood with heating elements, a hood ventilator which carried air from inside the hood to outside the house, at least one respirator with a cartridge, various equipment including glassware and a scale, and a pyrex dish with ephedrine, a substance commonly used to "cut" illegal drugs. The manufacture of Euphoria produces a toxic gas for which ventilation is required. Also found were some chemicals as well as a "white slab" and some white powders which, when tested by the government using four methods, were found to contain 4-methylaminorex. Other chemicals were found but were destroyed before being tested. The agents found in the bedroom four pieces of paper which, when read together, contained most of the recipe for making 4-methylaminorex.

Lyrissa Touby contends that she cannot be found to have conspired to manufacture 4-methylaminorex because she was not aware of the illegal nature of her activities and therefore did not enter into any agreement to reach an illegal goal. Her argument is based on the assertion

that she and her husband had a T-shirt business, that she thought that the chemicals she picked up were for the T-shirt business, that some of the chemicals found were not related to the manufacture of 4-methylaminorex and that inconsistent with affixing designs on T-shirts, that her fingerprints and handwriting were not connected with the drug recipe or the laboratory, that she had no knowledge of the complicated chemical processes her husband was doing, and that she did not know that her husband was doing anything illegal.

However, the laboratory for making Euphoria was in her marital bedroom. The jury could reasonably infer that because the laboratory was set up in the bedroom rather than a more suitable site in the house, it was designed to be secret and that she knew it was illegal. Furthermore, there was ample evidence that the drug was actually manufactured there and that she participated in the manufacture by picking up necessary chemicals.

The cases Lyrissa Touby relies on are inapposite because they concern situations where there was no proof that the defendant knew of the existence of the drugs. *See United States v. Terselich*, 885 F.2d 1094 (3d Cir. 1989) (insufficient evidence that passenger knew purpose of the trip was to transport drugs concealed in hidden compartment of car); *United States v. Wexler*, 838 F.2d 88, 92 n.2 (3d Cir. 1988) (insufficient evidence to conclude that defendant who acted as lookout for truck knew that there were drugs "behind a closed truck door which he neither drove nor rode in"). In this case, the evidence, albeit circumstantial, was sufficient to permit the jury to infer that Lyrissa Touby had the requisite knowledge of the scheme to manufacture 4-methylaminorex and knowingly participated.

IV.

Touby's Pro Se Arguments

In his pro se submissions, Daniel Touby takes issue with the district court's calculation for sentencing purposes of the total quantity of the drugs involved in the conspiracy to manufacture 4-methylaminorex. The Probation Office had concluded that ten kilos of Euphoria were involved and determined that the appropriate guideline base for the Toubys was 32. Touby's counsel, on the other hand, suggested a base level of 16. The district court adopted a guideline base of 18 after finding as a fact that there were sufficient ingredients in the Toubys' bedroom to manufacture 250 grams of Euphoria.[7] This finding was based in part on the presence of two bottles of cyanogen bromide and the inference that the two-thirds missing from one bottle had been used to create the 100-gram sample of Euphoria that was found, so that the remaining chemicals were sufficient to manufacture an additional 150 grams.

Touby argues that the 100 grams of Euphoria found in the bedroom was only 2.7% pure and that only pure Euphoria, rather than the total weight of the product, can be used in calculating the guideline base. His argument is inconsistent with the Sentencing Guidelines which provide that the base offense level of a defendant convicted of manufacturing and conspiring to manufacture scheduled drugs is determined by the quantity of drugs defendant is found to have manufactured or conspired to have manufactured. Sentencing Guidelines § 2D1.1(a)(3). The footnote to the applicable Guidelines provision indicates that "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing

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[7] It is undisputed that for sentencing purposes one gram of Euphoria is equivalent to .1 gram of heroin or .5 grams of cocaine.

a detectable amount of the controlled substance." *Id.* at footnote, Drug Quantity Tables. *See also United States v. Gurgiolo*, 894 F.2d 56, 60-61 (3d Cir. 1990) (explaining footnote).

Although Touby argues that 97.3% of the 100-gram slab contained other poisonous ingredients which rendered the substance inconsumable, there was no attempt to prove at trial or at the sentencing hearing that these ingredients were manufacturing by-products rather than a "cut." In fact, a government witness testified at trial that additional ingredients are often added to "cut" drugs, and defendants offered no evidence to discredit or rebut this testimony.[8] There is no basis in this record to deviate from the general rule that the total weight of the drugs should be used for determining the criminal offense level, even if a deviation were permissible.

Daniel Touby's second argument goes to the district court's determination that his sentence should be calculated as though his criminal history category was category II. Although the pre-sentence report indicated that the Toubys had no prior convictions and thus fell within criminal history category I, the government moved for a departure from the Guidelines based on under-reported criminal history pursuant to section 4A1.3 of the Sentencing Guidelines, which provides:

> If reliable information indicates that the criminal history category does not adequately reflect the seri-

[8] Daniel Touby contends that his counsel was ineffective for failure to bring to light the poisonous nature of the materials. This argument cannot be considered on this direct appeal because it was not raised at trial and there is an inadequate record with respect thereto. *See* United States v. Theodoropoulos, 866 F.2d 587, 598 (3d Cir. 1989); Government of Virgin Islands v. Zepp, 748 F.2d 125, 133-34 (3d Cir. 1984). Similarly, there was no testimony at trial to support Touby's contention that he had really intended to make Eucharist, a non-scheduled substance, rather than Euphoria. In fact, his counsel made a tactical decision not to proceed along that line.

> ousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:
>
> . . . .
>
> (d) whether the defendant was pending trial, sentencing, or appeal on another charge at the time of the instant offense.

Sentencing Guidelines § 4A1.3. Under the commentary, if the court departs under this provision it should look to the guideline range of a defendant with a higher criminal history category. *Id.*

In determining that a departure from the Guidelines was warranted, the district court relied on information in the Preliminary Sentencing Investigation Report that the Toubys were indicted on January 18, 1988 in New Jersey on two counts of possession of a controlled dangerous substance, two counts of possession with intent to distribute, two counts of conspiracy, seven counts of forgery, four counts of uttering a forged instrument, and four counts of theft by deception. Daniel Touby pled guilty to one forgery and one theft count and both pled guilty to possession of marijuana with intent to distribute. The authorities had found five pounds of marijuana, worth $25,000, a garden containing over 50 marijuana plants, a basement set up to cultivate marijuana, and electronic balance and scale, and bags filled with marijuana.

In addition, the Toubys pled guilty in New Jersey on October 19, 1988 to counts arising from different incidents and a different indictment. Daniel Touby pled guilty to possessing 25 grams of marijuana with intent to distribute on school property, possession of drug paraphernalia with intent to distribute, and advertising and

promoting drug paraphernalia. Lyrissa Touby pled guilty to possession of marijuana with intent to distribute and possession of drug paraphernalia with intent to distribute. Finally, Daniel Touby was charged on August 15, 1988 with burglary, unlawful entry, exercising unlawful control over movable property, and theft.

Even if, as Touby represented, he planned to withdraw his guilty pleas and the respective state courts would have allowed the withdrawal, the Toubys would still be facing trial on the charges. As the district court noted, the Guidelines provide for an upward departure if the defendant was pending trial or sentencing on another charge at the time of the instant offense. In light of the above, we cannot conclude that the district court was unreasonable in its application of the Sentencing Guidelines. *See* 18 U.S.C.A. § 3742(f)(2) (1989).

V.

Conclusion

For the reasons set forth above, we will affirm the judgment of conviction and sentence.

HUTCHINSON, Circuit Judge, *dissenting*.

In this case, the Court sustains a broad delegation of Congress's core legislative power to define primary criminal conduct to the Executive's chief law enforcement officer, the Attorney General, against a facial attack on the constitutionality of that delegation. Specifically, the statute in question, 21 U.S.C. § 811(h) (1988), gives the Attorney General the power to prohibit the manufacture, use, or distribution of drugs he believes present an imminent danger to the public safety on pain of severe criminal sanctions without the independent check of either a controlling scientific and medical evaluation by a regulatory agency with expertise in the properties and effects of drugs or judicial review of the Attorney General's decision by the courts. I cannot reconcile that result with any viable version of the non-delegation doctrine, a doctrine that the Court concedes has continuing vitality, *see* Opinion of the Court, typescript at 10, despite the dormancy of its application in recent times. *See Mistretta v. United States*, 109 S. Ct. 647, 654 (1989).[1] I therefore respectfully dissent.

I agree with the Court that the Toubys have mounted only a facial attack on the statute limited to improper delegation, despite their statement that the statute is also invalid as applied to them. They presented no evidence, and I find none elsewhere in the record, that "euphoria" is not a danger to the public safety or that the Attorney General acted arbitrarily or otherwise improperly in temporarily scheduling it. I also accept the Court's statement of the statutory background, the nature of the problem, the facts of the case and its holding that we have jurisdiction to consider the constitutionality of this particular delegation of lawmaking power to the Attorney General. Except for its treatment of the criminal aspect of this delegation, I am likewise generally in accord with its listing of the factors for consideration in determining whether a particular delegation of legislative power is valid under Article I, § 1 of the Constitution. However, I believe the Court errs in holding that this delegation to the Attorney General is valid. In 21 U.S.C. § 811(h), Congress tells the executive branch to subject drug users to severe criminal sanctions whenever the Attorney General decides a particular new drug poses an "imminent hazard to the public safety" without independent, a priori regulatory control or a posteriori ju-

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[1] Because of my view that 21 U.S.C. § 811(h) is an unconstitutional delegation of legislative power to the Attorney General, I do not reach or consider the issues of sub-delegation to the Drug Enforcement Agency Administrator, Lyrissa Touby's attack on the sufficiency of the evidence, or Daniel Touby's *pro se* arguments.

dicial review.[2] In support of its holding, the Court cites various cases upholding delegations that run afoul of some of the factors material to an analysis of the validity of legislative delegation. However, in none of those cases, nor in any that my research has uncovered, has a court upheld a statute that gives broad delegation to define primary criminal conduct to the official chiefly responsible for criminal law enforcement without either independent expert control or judicial review.

I note first that the broad standard Congress enacted to control the Attorney General's exercise of the lawmaking power relates to the definition of criminal conduct by a law enforcement officer. Unlike the Court, I think the power to impose primary criminal sanctions is a factor to be considered when evaluating a statute under the nondelegation doctrine. The Court cites *United States v. Frank*, 864 F.2d 992 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989), for the proposition that the standard governing the delegation of the power to establish criminal penalties is no more stringent than that which governs any other delegation of lawmaking power. In my judgment, *Frank* is distinguishable. Moreover, I do not believe that the statement the Court cites from *Frank* is controlling on the relevance of primary criminal sanctions to valid delegation.

Frank involved a delegation of the power to limit objectively the range within which a sentence could be imposed on a person already adjudged guilty of criminal conduct within a narrower band than the broad punitive range set by the particular criminal statute involved. Our decision upholding the delegation in *Frank* was ultimately vindicated by the decision of the Supreme Court

[2] The Court reserves the question of review under the text of the Fifth Amendment's Due Process Clause. *See* Opinion of the Court, typescript at 9 n.2. For the reasons set forth, *infra* typescript at 10. I do not think that this satisfactorily deals with the delegation problem.

in *Mistretta*. A delegation of the power to limit the range of penalties that the government may impose upon criminal conduct defined by Congress is different than the power to define the conduct that must be shown to have occurred before any criminal penalty may be imposed. Courts have generally held that substantive criminal conduct must be precisely defined by statute. The sentencing power is different. Before the Sentencing Guidelines, the length of a sentence was left to the discretion of the sentencing court, provided only that it acted within the broad range set in the statute. *See Mistretta*, 109 S. Ct. at 650.

Aside from the fact that *Frank* is distinguishable, the construction the Court places on its statement that a majority of the Supreme Court has not shown any inclination to preclude more strictly a delegation of lawmaking power in the criminal field, is contrary to the statement of the United States Supreme Court in *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947). In *Fahey*, the Supreme Court, in upholding a delegation of the terms for which conservators could be appointed to oversee failed savings and loan associations, said that what may be allowed in connection with supervisory actions may not be allowed in the creation of new crimes, at least in uncharted fields. The field of dangerous drugs is, of course, not entirely uncharted. However, the cartographer has heretofore been the Secretary of Health and Human Services, perhaps with the Attorney General in the role of pilot. This statute gives the Attorney General both functions. In *United States v. Robel*, 389 U.S. 258, 275 (1967). Justice Brennan, in a concurring opinion, expressly stated that "[t]he area of permissible indefiniteness [in delegation] narrows . . . when the regulation invokes criminal sanctions."

Because of the difference between the delegation of the power to define sanctions for criminal conduct and the power to define the conduct that will permit those

sanctions, and these statements by the Supreme Court, I do not believe the statement made in *Frank* adequately supports the Court's conclusion that there is no difference between the application of the non-delegation doctrine in the criminal field, as opposed to its application in the civil and regulatory fields. Indeed, as the Court recognizes, the only two cases that have held congressional delegation of broad legislative power constitutionally invalid involved the delegation of power to create laws that subjected the violator to criminal penalties. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

The Court correctly states that the Constitution does not prohibit Congress from delegating its authority to coordinate branches if it sets forth an "intelligible principle" limiting the bounds of the delegated authority. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). I agree with the Court that a delegation to prohibit the use of dangerous drugs for the purpose of avoiding "an imminent hazard to the public safety" is in and of itself an intelligible principle under the teachings of the Supreme Court. *Cf. National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding "public convenience, interest and necessity" as a valid basis for FCC regulations); *Lichter v. United States*, 334 U.S. 742, 783-87 (1948) (upholding "excessive profits" standard as the basis for administrative renegotiation of wartime supply contracts).

But what are we to say of the delegation to a law enforcement officer of the power to define primary criminal conduct in accordance with a broad "intelligible principle" if Congress prohibits the judiciary from determining whether the law enforcement official has acted within the limits of that principle? Congress had said that "[a]n order issued under [the temporary scheduling power] is not subject to judicial review." 21 U.S.C. § 811(h)(6). I am, of course, mindful of the maxim of

statutory interpretation that a statute should be construed as constitutional if at all possible, *see Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring), and I would so construe this statute if its language, legislative history and existing case law permitted me to do so.[3] Nevertheless, I believe that the language of § 811(h)(6) shows that Congress intended to preclude the judiciary from substantively reviewing the Attorney General's exercise of the broad discretion Congress gave him.

The language of § 811(h)(6) itself is unequivocal. It says that the Attorney General's action is "not subject to judicial review." I do not think that the strong presumption in favor of judicial review can prevail against this express preclusion. At the very least, § 811(h)(6) precludes review under the Administrative Procedure Act. Even if the language of § 811(h)(6) leaves open the question of whether an individual indicted for the manufacture, use or distribution of a substance that the Attorney General has temporarily scheduled can defend on the ground that the Attorney General acted beyond his delegated power, the history of the statute indicates that Congress had no intention to permit such a defense. The Court seems to recognize this absolute prohibition on judicial review, other than to review for due process, when it states: "Judicial review is the usual vehicle by which the executive action is tested to insure that 'the will of Congress has been obeyed.'" *See* Opinion of the Court, typescript at 18 (citing *Skinner v. Mid-American*

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[3] I am also mindful of the gravity of the drug problem in this nation and of the technical difficulty Congress faces in enacting statutes to control it in the face of illicit drug dealers' entrepreneurial and technical abilities to compound chemical escapes from reality with ever-changing formulae. Because of this, a quick and flexible law enforcement response is not only desirable, but essential. However, it is, I believe, also essential that the power of the law enforcer to define criminal conduct be subject to independent control.

Pipeline Co., 109 S. Ct. 1726, 1731 (1989) (quoting *Mistretta*, 109 S. Ct. at 658)).

Recognizing the problem presented by the statute's preclusion of judicial review, the Court suggests that the implication of this prohibition on the facial validity of the statute can be avoided, and it cites some of the many cases in which some limitation on judicial review of administrative action has been upheld by the Supreme Court. None of these cases involves a delegation of the power to define primary criminal conduct, and I do not think that any of them stands for the proposition that judicial review of whether the delegee has acted within the substantive confines of the delegated power may be precluded.

Block v. Community Nutrition Inst., 467 U.S. 340 (1984), is, in my judgment, not apposite. In *Block*, the Supreme Court held that consumers may not obtain judicial review of milk marketing orders issued by the Secretary of Agriculture. Considering the history of milk marketing, I read that case as simply holding that Congress did not intend to give consumers standing to review milk marketing orders. It is plain from the decision, the statute and the regulations themselves that judicial review of milk marketing orders issued by the Secretary of Agriculture was available to processors of dairy products. The question before the Court was not whether Congress had precluded judicial review, but whether it had afforded consumers affected by such orders standing to attack the Secretary's orders as beyond the delegated power.

In *Briscoe* v. *Bell*, 432 U.S. 404 (1977), a statute came closed to prohibiting judicial review of whether the delegee had acted within the limits of his delegated power. In that case, the Supreme Court enforced a provision in the Voting Rights Act barring "judicial review in any court" of the Attorney General's determination that preconditions for the application of the Act to

particular jurisdictions had been met. *Briscoe*, however, was not a criminal case; even so, the Court noted that review would be available under an exemption provision contained in the Act. *See id.* at 411.

Johnson v. Robison, 415 U.S. 361 (1974), involving the preclusion of judicial review in non-constitutional attacks on the Veterans Administration's provision of benefits, is an unremarkable case. Delegation of the power to decide issues concerning veterans' benefits has been wholly entrusted to persons within the executive branch since the First Congress. *See* 1 K. Davis, *Administrative Law Treatise* 158 (2d ed. 1978).

Yakus v. United States, 321 U.S. 414 (1944), did involve criminal sanctions for violating price controls promulgated by the Office of Price Administration under the wartime Emergency Price Control Act. There, however, review, while strictly limited as to time, was available through the wartime Emergency Court of Appeals. No emergency court is available to review the scheduling of newly created designer drugs.

United States v. Caudle, 828 F.2d 1111 (5th Cir. 1987), did not state the constitutional basis on which it upheld the dismissal of an indictment charging an individual with distribution of a temporarily scheduled drug because the Attorney General had not issued the order in accordance with the time limits provided in § 811(h), and the court there did not discuss limitations on the preclusion of judicial review in § 811(h)(6). *Caudle* involved the failure to follow the notice procedure that the statute requires, a procedure that certainly has due process implications. The court did not reach the question of whether the drug presented an "imminent hazard to the public safety."

The Court, citing *Estep v. United States*, 327 U.S. 114 (1946), suggests that § 811(h)(6) does not preclude all review of the temporary scheduling power. *Estep* is dis-

tinguishable. The statutory language considered in *Estep* did not preclude judicial review, but simply made the action of the independent civilian administrative authorities "final." As Professor Jaffe points out, courts have almost uniformly refused to interpret language providing that the decisions of administrative authorities shall be "final" as precluding judicial review. While such language may affect the scope of review, it does not normally preclude it. *See* L. Jaffe, *Judicial Control of Administrative Action* 356 (1965). Thus, in *Estep*, the Court held that a draftee who faced criminal prosecution for refusing to submit to induction could raise the defense that the Draft Board's actions were lawless and outside its jurisdiciton, despite a statutory provision rendering decisions of administrative authorities "final."

The precise basis for the decision in *Estep* is unclear, but Professor Jaffe suggests that it was decided upon statutory, rather than constitutional grounds, *see id.* at 392, though perhaps with a flavor of due process. The Court seems to recognize that *Estep* is not a delegation case. Its reference to *Estep* follows its statement that: "As we have already suggested, *see supra* note 2, this does not necessarily preclude review of the application of the temporary scheduling power in an individual case." Opinion of the Court, typescript at 20. Footnote 2 of the Court's opinion deals with due process challenges, not challenges to delegation.

Of course, I agree with the Court that Congress has not deprived the federal judiciary of jurisdiction to test the constitutionality of this statute. *See* 28 U.S.C. § 1331. But, I believe that § 811(h)'s legislative history supports the view that Congress did not intend to permit judicial review of the substantive basis for the Attorney General's temporary scheduling. Considering the breadth of the delegation, such review, even for an arbitrary and capricious failure to act within the broad limiting standard, would be likely to interfere with Congress's declared

intention to deal promptly with what it saw as an emergency situation. *See* S. Rep. No. 98-225, 98th Cong., 2d Sess., 262, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3444.

The Court states that § 811(h) does not give the Attorney General power to define primary criminal conduct because Congress, not the Attorney General defined the crime in § 812(b) by setting forth three criteria independent of § 811(h) that a Schedule 1 drug must meet. The § 812(b) criteria seem to me to be, at most, a direction to the Attorney General, the official charged with adding drugs to Schedule I pursuant to the power given him by § 811(h). I consider officials acting under § 811(h) secondary actors. The primary actor is the defendant, the person charged with manufacture, use or distribution of the drug. The crime for which a defendant is prosecuted is not, however, the manufacture, use or distribution of a drug that has the three characteristics Congress set forth in § 812(b). Rather, it is the manufacture, use or distribution of a drug the Attorney has scheduled under § 811(h). If Congress has directly defined the crime in terms of the three § 812(b) criteria, each defendant charged with possession of a drug the Attorney General had scheduled would, it seems to me, be able to attack the sufficiency of the evidence as to each of the three criteria Congress sets forth. I believe Congress did not intend to require the government to prove beyond a reasonable doubt the presence of these three factors in each case. If there were such a requirement, there would be little point in granting the Attorney General the power to schedule particular drugs.

As the Court recognizes, this is not to say that we could not review the Attorney General's actions under the Due Process Clause. However, the question before us is not due process but the intent of Congress to preclude review of the Attorney General's actions under the non-delegation doctrine. Considering the statutory pro-

hibition against judicial review, the nature of the power delegated, the breadth of the delegation, the person to whom the delegation is made and the imprecision of the remedy afforded persons affected by a decision if the regulatory body with expertise and experience in the field concludes that the Attorney General is wrong in scheduling a particular drug. I believe that § 811(h) is facially invalid because it places no independent, a priori or a posteriori check on the Attorney General's power to define a crime. The doctrine of separation of powers that underlies our constitutional system of government seems to me to require such a check.

The prohibition against overbroad and unchecked delegation has its roots in the philosophical assumptions that caused the framers of our system of government to make a tri-partite separation of the federal government's sovereign power among the legislature, the executive and the judiciary. This separation does not promote the efficient functioning of government. It is often inconvenient, but an examination of the historical background in England and the colonies indicates to me that the framers thought that such a separation was an important safeguard of individual liberties.[4] According to Blackstone:

> In all tyrannical governments, the supreme magistracy, or the right both of making and enforcing laws is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no liberty.

1 Blackstone, *Commentaries on the Laws of England* 146 (7th ed. 1775), *quoted in* 1 K. Davis, *supra* typescript at 9, at 68. The doctrine, rooted in separation of powers, that prohibits Congress from overbroad delegations

[4] For an extended discussion of the historical background and the relation between the original text of the Constitution and the Bill of Rights, see Gibbons, *Factions*. 20 Seton Hall L. Rev. 344 (1990).

of its legislative power resides in the original Constitution as ratified by the states. Due process has its basis in the text of the Fifth Amendment. Both are part of constitutional law.

If due process is the only basis upon which individuals can be protected from arbitrary and capricious governmental actions, there would be no point in extended discussion of the prohibition against the delegation of legislative powers. That doctrine would have no part in judging an individual case. The protection of individual rights, apart from due process, would be left to the self-interest of each of the three branches in defending its own turf against intrusion by the other two.

However, if the prohibition against delegation has any vitality, it has it apart from the Bill of Rights and the Due Process Clause that Bill includes. It is therefore no answer to a question of improper delegation to suggest that an individual affected by the scheduling of a particular drug under Schedule I as an imminent hazard to the public safety can challenge the application of the criminal prohibition to him on due process grounds. Nor is it an answer that the individual could perhaps even attack the scheduling itself as being beyond the substantive bounds of the "intelligible principle" that limits the delegated legislative power; or, alternately, that if the Attorney General's order is "vacated" the individual could have his indictment dismissed or his conviction expunged by habeas or otherwise a year or eighteen months later when the Attorney General or an independent expert authority determines that the drug on which his conviction was based was not dangerous enough to warrant its scheduling.

If this delegation is constitutional, I believe any individual protection provided by the constitutional prohibition against a general delegation of legislative power is a relic of the past. It may be that the evolution of due process as a direct guarantor of individual liberties has

made the indirect assurance of the delegation doctrine and the separation of powers obsolete or unnecessary. I am, however, unwilling to consign it to the museum until the Supreme Court so decides. This Court's opinion finds the non-delegation doctrine moribund. It leaves it dead. Since this delegation is insulated from judicial review on the face of the statute, its conflict with the doctrine of the separation of powers must be decided independently of the individual's right to due process.

Other courts that have considered the question of Congress's delegation of the power to temporarily schedule on an emergency basis have expressed concern over the constitutional implications of that delegation. *See, e.g., United States v. Spain*, 825 F.2d 1426, 1429 (10th Cir. 1987) ("The Congressional delegation to the Attorney General is not without doubt as to adequacy of standards in 811(h) . . . ."). I believe that concern is well-founded. Considering the nature of the power delegated, the breadth of the delegation, the absence of substantive checks upon the Attorney General's law enforcement power and the preclusion of judicial review, I would hold that 21 U.S.C. § 811(h) is an improper delegation of legislative power violating the principle of separation of powers embodied in part in Article I, § 1 of the original text of our Constitution. That principle is designed to protect individuals against the arbitrary exercise of sovereign power by dividing it among the three branches of government that the draftsmen of the Constitution created, so that each one may check the excesses of the others, to the benefit of the individuals whose rights and tranquility the Constitution is meant to secure, not only in their daily intercourse with each other but also in their interactions with the officials to whom they have entrusted the power to govern them. For these reasons, I would reverse the Toubys' convictions.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5604/5

UNITED STATES OF AMERICA

vs.

DANIEL TOUBY, Appellant in No. 89-5604

(D. C. Criminal No. 89-00006-01)

UNITED STATES OF AMERICA

vs.

LYRISSA TOUBY, Appellant in No. 89-5605

(D. C. Criminal No. 89-00006-02)

On Appeal from the United States District Court
for the District of New Jersey

Present: SLOVITER, HUTCHINSON and COWEN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel January 23, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered July 21, 1989, be, and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

July 27, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5604 and 89-5605

UNITED STATES OF AMERICA

v.

DANIEL AND LYRISSA TOUBY,
Appellants

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and ALITO, *Circuit Judges*

The petition for rehearing filed by Appellants Daniel and Lyrissa Touby in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Becker and Judge Nygaard would grant rehearing in banc. Judge Hutchinson would grant rehearing for the reasons set forth in his dissent.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: Aug. 21, 1990

SUPREME COURT OF THE UNITED STATES

No. 90-6282

DANIEL TOUBY, *et ux.*,
Petitioners,

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 14, 1991

No. 90-6282

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DANIEL TOUBY and LYRISSA TOUBY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Controlled Substances Act, as amended, unconstitutionally concentrates in the Attorney General the unreviewable power to criminalize conduct involving previously lawful drugs.

2. Whether, under the Controlled Substances Act, as amended, the Attorney General properly subdelegated his unreviewable power to criminalize new drugs to the Administrator of the Drug Enforcement Administration.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-6282

DANIEL TOUBY and LYRISSA TOUBY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 909 F.2d 759 and is reprinted at J.A. 27. The opinion of the United States District Court for the District of New Jersey is reported at 710 F. Supp. 551 and is reprinted at J.A. 2.

JURISDICTION

The court of appeals entered judgment on July 27, 1990. A timely petition for rehearing was denied on August 21, 1990. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

The pertinent provision of the Controlled Substances Act, as amended, 21 U.S.C. § 811(h), and the pertinent federal regulation, codified at 28 C.F.R. § 0.100(b), are set forth in the appendix to this brief.

STATEMENT

In 1987, the drug 4-methylaminorex was temporarily classified as a Schedule I controlled substance, making its possession, manufacture, or distribution a federal crime. That decision, which criminalized previously lawful conduct, was not made by Congress but by the Administrator of the Drug Enforcement Administration (DEA), acting pursuant to a purported subdelegation of the authority that Congress had delegated to the Attorney General under the Controlled Substances Act, as amended, 21 U.S.C. § 811(h). That provision permits the Attorney General, in his sole and unreviewable discretion, to classify drugs as unlawful for a period of up to eighteen months, and thereby define the crimes he then prosecutes.

Petitioners Daniel and Lyrissa Touby were convicted of manufacturing and of conspiring to manufacture Euphoria, in violation of 21 U.S.C. §§ 841(a)(1) and 846. They were sentenced, respectively, to 42 and 27 months' imprisonment. Petitioners challenge both the constitutionality of Congress's grant of this crime-defining power to the Attorney General and the validity of the DEA Administrator's exercise of that power by purported subdelegation.

A. The Controlled Substances Act

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970). Title II of the statute was designated the Controlled Substances Act ("the Act"), now codified at 21 U.S.C. §§ 801-904. The Act prohibits the

possession, manufacture, or distribution of a "controlled substance," 21 U.S.C. § 841(a)(1), and specifies five categories in which such drugs can be classified, 21 U.S.C. § 812(a). Those categories, or "schedules," carry different criminal penalties, the least severe for Schedule V, the most severe for Schedule I. Classification into Schedule I depends on a drug's relative safety for use, its potential for abuse, and its current medical uses in the United States, if any. 21 U.S.C. § 812. Classification into Schedules II through V depends on those factors as well as on a drug's relative potential to cause physical or psychological dependence.

Congress initially enumerated the drugs falling within each of the five schedules. 21 U.S.C. § 812(c). It also authorized the Attorney General to modify the schedules —to add and remove drugs, as well as to transfer drugs among the schedules—on a permanent basis. 21 U.S.C. § 811(a). That authority must be exercised in accordance with several specific congressional requirements.

To begin with, the Attorney General cannot act unilaterally. Before the Attorney General may even initiate scheduling proceedings, the Secretary of the Department of Health and Human Services ("HHS") must perform a scientific and medical evaluation of the drug at issue and render a formal, written report and recommendation on its proper classification. 21 U.S.C. § 811(b). The Secretary's recommendation binds the Attorney General on the scientific and medical status of the substance, and any recommendation by the Secretary *not* to schedule a drug precludes the Attorney General from ordering otherwise. *Ibid.*

Even with a favorable scheduling recommendation from the Secretary, moreover, the Attorney General may permanently schedule a drug only upon finding that it has a potential for abuse and that it meets the additional requirements for the proposed schedule. 21 U.S.C. § 811(a)(1). Schedule I, for example, requires a determina-

tion that the drug (1) has a high potential for abuse, (2) has no currently accepted medical use in treatment in the United States, and (3) is not accepted as safe for use under medical supervision. 21 U.S.C. § 812(b). Those findings, in turn, must rest on consideration of eight specific factors, including, *inter alia*, the drug's actual or relative potential for abuse and any known scientific evidence of its pharmacological effect. 21 U.S.C. § 811(c).[1] Finally, the Attorney General's evaluation of these substantive criteria must be undertaken pursuant to the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, thereby ensuring that permanent scheduling orders are subject to judicial review. 21 U.S.C. § 811(a).

B. The Addition of the Temporary Scheduling Power

In 1984, Congress amended the Controlled Substances Act to add a temporary scheduling power to the Attorney General's authority to criminalize particular drugs. Dangerous Drug Conversion Control Act of 1984, Pub. L. No. 98-473, codified at 21 U.S.C. § 811(h). Recognizing that the permanent scheduling procedures can take up to a year to complete, and concluding that faster action was sometimes needed, Congress empowered the Attorney General temporarily to place a previously lawful (unscheduled) drug in the most severe category, Schedule I, without "await[ing] the exhaustive medical and scientific determinations ordinarily required when a drug is

[1] The Attorney General must also consider these additional factors: (1) the state of current scientific knowledge concerning the drug; (2) its history and current pattern of abuse; (3) the scope, duration, and significance of abuse; (4) what, if any, risk the drug poses to the public health; (5) its psychic or physiological dependence liability (how addictive it is); and (6) whether the substance is an immediate precursor of a drug already controlled under the statute. 21 U.S.C. § 811(c). The Secretary of HHS must likewise consider the scientific and medical considerations inherent in all of the factors when evaluating a drug and formulating a recommendation to the Attorney General. 21 U.S.C. § 811(b).

being considered for control." S. Rep. No. 225, 98th Cong., 2d Sess. 265, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3447. A temporary scheduling order expires at the end of twelve months, but it can be extended for six months if the Attorney General has commenced permanent scheduling procedures under Section 811(a). 21 U.S.C. § 811(h)(2). During the time that a drug is temporarily scheduled, a conviction for its possession, manufacture, or distribution carries the same penalty as a violation involving a permanent Schedule I drug.

Under this new grant of power, the Attorney General need only find that designating a drug under Schedule I is "necessary to avoid an imminent hazard to the public safety." 21 U.S.C. § 811(h). That decision is to be made by the Attorney General in his unfettered discretion. Thus, Congress expressly exempted temporary scheduling orders from judicial review. 21 U.S.C. § 811(h)(6) ("An order issued under paragraph (1) is not subject to judicial review.") And the Secretary of HHS plays no necessary role: although he must be given notice of the Attorney General's intent to schedule a drug temporarily, the Secretary is not required to respond, let alone perform any scientific or medical evaluation; and if the Secretary does respond, the Attorney General need only consider the response, but is not bound by it. 21 U.S.C. § 811(h)(4).

The procedures for temporary scheduling, moreover, need not follow the procedures generally applicable to formal rulemaking. Instead, the Attorney General is required only to publish a notice of intent to schedule a drug and is barred from issuing a final order until 30 days after that publication. 21 U.S.C. § 811(h)(1). The substantive criteria for temporary scheduling are likewise truncated. Thus, in lieu of the eight factors that govern permanent scheduling, *see* page 4 & n.1, *supra*, the finding of an imminent public hazard needs to rest on only three: (1) the drug's history and current pattern of

abuse; (2) the scope, duration, and significance of its abuse; and (3) what, if any, risk the drug poses to the public health. *Ibid.*[2]

C. The Subdelegation and Classification Decisions

Congress did not explicitly authorize the Attorney General to subdelegate to any other official the unreviewable authority—granted by Section 811(h) to "the Attorney General"—to define crimes by temporary scheduling. Nevertheless, in 1987, the Attorney General revised a previous regulation and subdelegated to the DEA Administrator all of the Attorney General's functions under the 1970 Act "as amended," except those specifically reserved or otherwise assigned. 28 C.F.R. § 0.100(b). That action, which did not mention the temporary scheduling authority of Section 811(h), was taken in reliance on general grants of subdelegation authority in 28 U.S.C. § 510 and 21 U.S.C. § 871(a). *See* 52 Fed. Reg. 24,447 (1987).

Acting pursuant to the regulatory subdelegation, the DEA Administrator in late 1987 placed 4-methylaminorex temporarily on Schedule I. 52 Fed. Reg. 38,225 (1987); 21 C.F.R. § 1308.11(g)(5) (1988).[3] That action was taken after the required 30-day notice period, but without any scientific or medical recommendation from

[2] Under the temporary scheduling provision, those three factors include "actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." 21 U.S.C. § 811(h)(3).

[3] The drug 4-methylaminorex was not newly designed or created. A relative of aminorex (which is commercially available under the trade names Menocil and Apiquel), the present drug was patented in 1964 by McNeil Laboratories, Inc., as assignee of George Poos (*see* U.S. Patent No. 3,161,650), after several studies had shown its potency as an appetite suppressant, *see* Yelnosky & Katz, *Sympathomimetic Actions of CIS-2-Amino-4-Methyl-5-Phenyl-2-Oxazoline*, 141 J. Pharmacology & Experimental Therapeutics 180 (1963); Poos et al., *2-amino-5-Aryl-2-oxazolines. Potent New Anorectic Agents*, 6 J. Medicinal Chemistry 266 (1963).

the Secretary of HHS. *See ibid.*[4] The scheduling recommendation was later extended to April 15, 1989. 53 Fed. Reg. 40,061 (1988). The drug became a Schedule I controlled substance under the Act's permanent scheduling procedures effective April 13, 1989. 54 Fed. Reg. 14,799 (1989); 21 C.F.R. § 1308.11(f)(2).

D. Proceedings Below

Petitioners, who were indicted on January 11, 1989, raised their challenges to Euphoria's temporary criminalization in pretrial motions to dismiss the indictment. The district court denied the motions, acting pursuant to its jurisdiction under 18 U.S.C. § 3231. J.A. 2-3, 19. A divided panel of the Third Circuit affirmed petitioners' subsequent convictions. J.A. 27, 54.

The majority rejected petitioners' argument that Congress had acted unconstitutionally in delegating the temporary scheduling authority to the Attorney General. It reasoned that such a delegation would violate the Constitution only if Congress had neglected to provide the Attorney General with "an intelligible principle" by which the emergency authority should be exercised. J.A. 34 (quoting *Mistretta v. United States*, 109 S. Ct. 647, 659 (1989)). The court concluded that Congress had provided a sufficient constraint on the Attorney General's authority here, emphasizing that the 1984 amendment required a specific finding of public necessity, demanded consideration of three designated factors, and responded to a need for expedition in scheduling. J.A. 38-42.

[4] The DEA Administrator notified the Assistant Secretary for Health of his intention to schedule 4-methylaminorex temporarily. *See* 52 Fed. Reg. 38,225 (1987). While the Assistant Secretary did not respond to the notification, the Food and Drug Administration advised the DEA that it had no objection to the scheduling. *Ibid.* No other comments were received by the DEA. *Ibid.*

Next, the court of appeals held that Section 811(h) was not rendered invalid by the express congressional preclusion of judicial review of temporary scheduling orders. The court acknowledged that judicial review generally ensures that "'the will of Congress has been obeyed'" and that "the discretion of the executive officer to whom power has been delegated cannot be exercised in an unbridled manner." J.A. 41-42 (citations omitted). But it nevertheless concluded that review of temporary scheduling orders could be denied because Congress intended that such orders be enforced promptly, without the interference of judicial oversight. *Id.* at 42.[5]

In reaching its decision, the Third Circuit rejected the argument that a more searching constitutional review was appropriate in this case because the delegation empowered the Attorney General to criminalize a previously legal drug. J.A. 35-38. Recognizing that this Court has several times suggested that a higher constitutional standard is warranted for delegations of crime-defining authority, the court of appeals ruled that no new crime is actually created when a drug is criminalized. *Id.* at 38. In any event, the court decided that the Constitution does not place greater limits on the delegation of crime-defining power than on other delegations. *Id.* at 36-37.

Having found the statutory delegation constitutional, the court then concluded that the Attorney General had properly subdelegated his temporary scheduling authority to the DEA Administrator. J.A. 48. The court first determined that, although Congress did not expressly authorize subdelegation of the temporary scheduling authority, no such express authorization is necessary when a general subdelegation statute exists. *Id.* at 45. Noting that 28 U.S.C. § 510 allows the Attorney General to designate any other officer or employee to perform functions assigned by law to "the Attorney General," the court concluded that that provision was sufficient to support the subdelegation at issue in this case.[6]

Judge Hutchinson dissented on the ground that the temporary scheduling provision in 21 U.S.C. § 811(h) was unconstitutional because it concentrated "Congress's core legislative power to define primary criminal conduct [in] the Executive's chief law enforcement officer." J.A. 54. Judge Hutchinson emphasized the absence of any independent check on the Attorney General's unilateral power under this statute to define the crimes he then prosecutes. He explained that an individual defendant may not obtain even limited judicial review of the substantive basis for a temporary scheduling order: Congress's prohibition of judicial review is "absolute." *Id.* at 59. Judge Hutchinson concluded, "If this delegation is constitutional, I believe any individual protection provided by the constitutional prohibition against a general delegation of legislative power is a relic of the past. . . . [The majority's] opinion finds the non-delegation doctrine moribund. It leaves it dead." *Id.* at 65-66.

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[5] The court of appeals also suggested without deciding that, in some set of undefined circumstances, an individual defendant indicted under a temporary scheduling order might be able to challenge that order on due process grounds. J.A. 33 n.2 ("Arguably, such a defense might be raised by a defendant who was convicted for manufacture, distribution or possession of a temporarily scheduled drug that was later removed from the schedule because it did not meet the criteria for permanent scheduling of prohibited substances.") (citations omitted).

[6] The court also rejected petitioners' other claims, namely that (1) the regulation by which the Attorney General had purported to subdelegate his authority to the DEA was insufficiently precise; (2) the evidence against Lyrissa Touby was insufficient to support the jury's finding; and (3) the sentence imposed on Daniel Touby was improper. J.A. 43-44, 48, 51, 54.

SUMMARY OF ARGUMENT

1. The Constitution separates the fundamental powers of government—the legislative, the executive, and the judicial—in order to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). That separation forms the core of the system of checks and balances by which the three Branches limit each others' excesses. The temporary scheduling statute violates that constitutional structure in two distinct ways that are mutually reinforcing in their unconstitutional effect.

First, the statute combines the criminal law powers of the Legislative and Executive Branches to be deployed against individuals like petitioners. The Attorney General is now empowered to decide, in his sole discretion, which drugs present "an imminent hazard to the public safety." 21 U.S.C. § 811(h)(1). Having made that decision, he may then determine, again in his sole discretion, which people to prosecute for violating his own rule. The exercise of either of those criminal law powers poses significant threats to individual liberty, and thus each is subject to substantial constitutional restrictions. *See, e.g.*, *United States v. Bass*, 404 U.S. 336 (1971); *United States v. Ward*, 448 U.S. 242 (1980). When both powers are united in one person, the resulting aggregation exceeds constitutional limits. Such an aggregation is not only unprecedented, but also utterly unnecessary: the Secretary of HHS, who has no prosecutorial authority, could equally well make emergency scheduling decisions.

Second, the temporary scheduling statute flatly prohibits judicial review of the crime-defining power that Congress has delegated. That feature substantially increases the threat to individual liberty already created by the combination of executive and legislative criminal law powers, because it ensures that there will be no structural check whatsoever on the Attorney General's ability

to bring down the criminal process on virtually anyone of his choosing. In addition, the elimination of judicial review independently violates the separation-of-powers principle. It is well established that all congressional delegations of rulemaking authority must include "an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Mistretta v. United States*, 109 S. Ct. 647, 654 (1989) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). The "intelligible principle" that constrains Executive Branch power to create crimes must be judicially enforceable "so that a court [can] 'ascertain whether the will of Congress has been obeyed.'" *Skinner v. Mid-America Pipeline Co.*, 109 S. Ct. 1726, 1731 (1989) (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

2. The exercise of the temporary scheduling power by the DEA Administrator is also invalid for the related reason that the Attorney General was not authorized to subdelegate that power. The appropriate test of any subdelegation, of course, is congressional intent. *See, e.g.*, *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 358-67 (1942). That requisite intent is lacking here. The temporary provisions, by their terms, are limited to the Attorney General. Nor can previously enacted statutes that generally authorize subdelegation of the Attorney General's powers be read to extend to the temporary scheduling authority—which, even if constitutionally valid, is nevertheless both unprecedented and constitutionally extraordinary. When Congress delegates powers of such novelty and overriding significance, a clear legislative statement should be required before the Court infers an intent to allow the specified delegatee to reassign those powers to anyone of his choosing. *See United States v. Giordano*, 416 U.S. 505, 512-23 (1974).

ARGUMENT

Petitioners' convictions must be reversed because the criminal provision that they were found to have violated was invalid for two reasons. First, the separation-of-powers principle prohibits the massive concentration of criminal law powers effected by the temporary scheduling statute. Second, even if Congress could have conferred such power on the Attorney General, he in turn was not authorized to subdelegate that power.

I. THE CONSTITUTION'S SEPARATION OF POWERS PROHIBITS CONGRESS FROM CONFERRING UNREVIEWABLE POWER TO CRIMINALIZE DRUGS ON THE NATION'S CHIEF PROSECUTOR.

The concept of a government based on separated powers is the fundamental principle on which our constitutional system rests. As James Madison said at the outset, "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *The Federalist No. 47*, at 301 (Madison) (C. Rossiter ed. 1961). That view remains unquestioned two centuries later: "[t]his Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 109 S. Ct. 647, 658 (1989).

At the same time, "[t]he men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who . . . saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). To accommodate these competing structural concerns, this Court has adopted a "common sense" approach to separation-of-powers analysis. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). The

Court has thus focused on those practices that raise "concern[s] of encroachment and aggrandizement" (*Mistretta*, 109 S. Ct. at 659), precisely because their result is to threaten liberty by unduly concentrating powers that should be separated and checked. *Compare INS v. Chadha*, 462 U.S. 919 (1983), *and Bowsher v. Synar*, 478 U.S. 714 (1986), *with Morrison v. Olson*, 487 U.S. 654 (1988) and *Mistretta v. United States, supra.*

The present case involves a particular aspect of the separation-of-powers principle—the so-called "non-delegation" doctrine: "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892). *See also Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1812). But petitioners' claim, unlike prior non-delegation claims, does not challenge the specificity of the substantive standards that Congress established to govern the exercise of delegated powers. Rather, petitioners challenge the temporary scheduling statute's unprecedented concentration of judicially unreviewable crime-defining power in the executive officer who also has the crime-prosecuting power.[7] That challenge bears directly on "the accumulation of excessive authority in a single branch" (*Mistretta*, 109 S. Ct. at 659) and thus implicates the most basic separation-of-powers concerns. *See Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (3-judge court) ("[t]he claim of undue delegation of legislative power broadly raises the challenge of undue power in the Executive").[8]

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[7] For that reason, the considerations that have led this Court to reject all post-1935 challenges to the specificity of statutory criteria do not affect the analysis in this case. *See* note 14, *infra.*

[8] In fact, the threat to individual liberty is potentially greater when the Legislative and Executive Branches voluntarily join to-

In particular, the temporary scheduling statute contains two distinct—but nonetheless reinforcing—constitutional infirmities. First, it combines in one official the power to establish criminal offenses with the power to prosecute violations. Second, it bars judicial review of that official's crime-defining decisions. In our view, each aspect is invalid. The inclusion of both in a single statute clearly goes beyond constitutional limits.

A. The Attorney General's Unilateral Authority To Create Crimes and Prosecute Violators Is An Unconstitutional Aggregation of Power.

The temporary scheduling provisions empower the Attorney General to select any drug that he deems to present an "imminent danger to public safety" and, for a period of 18 months, to make its manufacture or sale a felony punishable by up to 20 years in prison (or even by life imprisonment in certain circumstances).[9] Then,

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gether to aggregate their powers than when one Branch poaches on another. At least in the latter situation, the poached-upon Branch is armed with structural powers (*e.g.*, the Executive has the veto) as well as political powers to help fend off encroachment.

[9] Contrary to the Third Circuit's suggestion, these provisions *do* give the Attorney General "the power to 'define primary criminal conduct.'" J.A. 37. As explained in the dissenting opinion, "[t]he crime for which a defendant is prosecuted is not . . . the manufacture, use or distribution of a drug that has the three characteristics set forth in § 812(b). Rather, it is the manufacture, use or distribution of a drug the Attorney General has scheduled under § 811(h)." J.A. 63. Indeed, Congress has adopted a separate statute that criminalizes "controlled substance analogues"—*i.e.*, drugs that have "a chemical . . . structure . . . which is substantially similar to the chemical structure of a controlled substance in schedule I or II." 21 U.S.C. § 802(32)(A)(i). Accordingly, temporary scheduling is needed only for substances that are essentially *different* from drugs that are already proscribed. *See generally*, Note, *The Emergence and Emergency of Designer Drugs: Subdelegation of the Power Temporarily to Schedule in Light of United States v. Spain*, 14 Am. J. Crim. L. 257, 267 (1988) ("[t]he statute allowing temporary scheduling is, in fact, designed to be a policy-making tool, with the broad guideline of averting imminent danger").

by shifting from his legislative to his executive powers, the same Attorney General can prosecute anyone of his choosing for committing the crime that he has just created. This unprecedented combination of legislative and executive authority over criminal law matters is unconstitutional.

1. The aggregation of criminal law-making and prosecutorial power strikes at the heart of the system of checks and balances that guarantee the rule of law. Any combination of legislative and executive authority in a single officer, whatever the subject, raises constitutional concerns.[10] In the civil sphere, however, those concerns may be overridden, as our history shows, to permit combined rule-making and rule-enforcing authority in a single officer, if there are sufficient safeguards against abuse (principally, judicial review) and sufficiently good reasons for the combination (principally, needed expertise). *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (Federal Communications Commission); *American Power & Light Co. v. SEC*, 329 U.S. 90, 104-06 (1946). But criminal law is different. The constitutional concern with keeping the government's legislative and executive powers over citizens in separate hands is at its apex when the powers at issue are the power to define conduct as criminal and the power to prosecute individuals for that conduct.

Each of those powers is constitutionally distinctive, because of its profound importance for individual liberty.

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[10] *See The Federalist No. 47*, at 302-03 (Madison) (C. Rossiter ed. 1961) (quoting Montesquieu) ("'When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner."); *see also* 1 W. Blackstone, *Commentaries on the Laws of England* 146 (7th ed. 1775) ("In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty.").

As to the crime-defining power, the Constitution recognizes its special nature in, for example, the prohibitions on *ex post facto* laws and bills of attainder. *See* U.S. Const., art. I, Sec. 9.[11] Moreover, whereas federal courts have long had a range of common-law-making authority in a number of areas (*Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2514 (1988)), this Court has for almost two centuries insisted that crimes be defined by Congress rather than courts: "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). *See United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (federal courts have no authority to fashion common law crimes). The constitutionally distinctive character of criminal laws is also reflected in the familiar rule of lenity for construing such statutes (*see Rewis v. United States*, 401 U.S. 808, 812 (1971)), in the due process limits on vagueness in criminal laws (*see Kolender v. Lawson*, 461 U.S. 352, 357 (1983)), and in the several opinions from this Court that have suggested a stricter application of the non-delegation principle to criminal rulemaking even in the context of judging the specificity of legislative standards (*see* pages 30-31, *infra*).

The power to prosecute crimes is perhaps even more extraordinary in constitutional terms than the power to define crimes. At least in the realm of domestic affairs, the authority to prosecute individuals is uniquely awesome among the Executive's powers. As then-Attorney

[11] The *ex post facto* prohibition is limited to criminal laws (*Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)), while the bar on bills of attainder extends somewhat more broadly to punitive laws (*see, e.g., Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 851-52 (1984); *Nixon v. Administrator of General Services*, 433 U.S. 425, 468-69 (1977)). Those proscriptions are so important that they restrict not only the federal government (art. I, § 9) but the States as well (art. I, § 10).

General Robert Jackson acknowledged, "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America." Jackson, "The Federal Prosecutor" (1940). The Constitution recognizes that fact by laying down extensive rules that, either on their face or as construed, specially restrict prosecutorial power at every stage—from investigation, through charging, trial, sentencing, and appeal. *See United States v. Ward*, 448 U.S. 242, 248 (1980).[12] This special treatment of criminal law-enforcement, as of criminal law-making, follows directly from the fact that criminal liability imposes a uniquely onerous stigma of community moral condemnation and alone can lead to punitive deprivation of life or liberty. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 537-40 (1979); *Addington v. Texas*, 441 U.S. 418, 428 (1979); *United States v. Bass*, 404 U.S. at 348.

[12] Thus, virtually all of the numerous guarantees of the Fifth, Sixth, and Eighth Amendments restrict government power only in criminal cases. In addition, the Fourth Amendment, as applied by this Court, has special force in the criminal arena: the exclusionary rule has never been applied in civil cases. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041-50 (1984); *United States v. Janis*, 428 U.S. 433, 447 (1976). Similarly, the Fifth Amendment's due process guarantee has distinctive meaning in criminal cases—*e.g.*, it requires proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *compare United States v. Regan*, 232 U.S. 37, 47-48 (1914) (civil cases generally require proof under preponderance standard); *Addington v. Texas*, 441 U.S. 418, 427-31 (1979) (even in civil commitment proceeding, reasonable doubt standard is not applicable). Moreover, Article III guarantees a jury trial in criminal but not civil cases (art. III, § 2), and the Sixth Amendment guarantee of jury trial in criminal cases applies in state courts (*Duncan v. Louisiana*, 391 U.S. 145 (1968)), whereas the Seventh Amendment limited guarantee of jury trial in some civil cases does not (*Walker v. Sauvinet*, 92 U.S. (2 Otto) 90 (1876)). Among other special protections afforded against prosecutions, the Court has held that the Constitution generally affords criminal defendants, but not civil litigants, various rights to relief from financial barriers to pursuit of their claims in court. *Compare, e.g., Mempa v. Rhay*, 389 U.S. 128 (1967); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956) *with United States v. Kras*, 409 U.S. 434 (1973).

When the two powers of crime definition and crime prosecution are combined, the structural protection of individual liberty is undermined at its core. The Constitution is designed to guarantee, in this most sensitive of areas, that before an individual is subjected to a criminal prosecution, two separate judgments will have been made —the first, that particular conduct should be criminalized; and the second, that the individual deserves prosecution for a violation. That guarantee is eliminated when the prosecutor himself is given the power to make both judgments.

The potential for "tyrannical" abuse in such a departure from the constitutional guarantee is both obvious and beyond constitutional limit. That potential is considerably greater than what then-Attorney General Jackson described in 1940 as "the most dangerous power of the prosecutor":

> that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.

Jackson, *supra*. A statute like the temporary scheduling provisions frees the Attorney General of the need even to search the statute books for a particular crime. Indeed, even if he knows full well that the targeted individual's conduct is not "the commission of a crime," the

Attorney General can nevertheless make that conduct criminal so that he will then have the discretion necessary to invoke the full panoply of investigative and prosecutorial powers against an individual who continues to engage in the newly proscribed conduct.

2. The amalgamation of crime-defining and crime-prosecuting authority in a single official appears to be entirely unprecedented in our history. No case supports such a combination. Equally important, until the temporary scheduling statute, as far as we have been able to discover, Congress had *never* combined unilateral crime-defining and crime-prosecuting power in a single executive official.

Thus, Congress has often granted executive departments and agencies the authority to promulgate regulations that govern private conduct, and some of the resulting regulations are enforceable through criminal prosecutions. *See, e.g., Yakus v. United States*, 321 U.S. 414 (1944) (upholding law making violation of Price Administrator's regulations a crime); *United States v. Grimaud*, 220 U.S. 506 (1911) (upholding law authorizing Secretary of Agriculture to promulgate rules whose violation was a crime). Moreover, a number of executive agencies and departments may bring civil suits to enforce their own regulations, even though the general rule is that litigation on behalf of the federal government is reserved to the Attorney General and the Department of Justice, 28 U.S.C. § 516. *See, e.g.*, H.R. Rep. No. 198, Part I, 98th Cong., 1st Sess. 50 (1983). But no regulatory agency or department, to our knowledge, has been permitted to bring criminal cases to enforce its regulations (or any statute). The prosecutorial power has been reserved to the Department of Justice, under the direction of the Attorney General.[13]

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[13] Section 547 of Title 28, U.S.C., states that, except as otherwise provided by law, the prosecution of all offenses against the United States is reserved to the United States Attorneys. Section 519

If prosecutorial authority has always been kept out of the hands of rulemakers, so too, apparently, the authority to make criminally enforceable rules has been keep out of the hands of the prosecutors. With the exception of the temporary scheduling provision, we have not found a single statutory grant to the Attorney General of authority unilaterally to promulgate regulations whose violation he may then prosecute. The permanent scheduling provisions come close, but even they give a veto power over any regulations to the Secretary of HHS. 21 U.S.C. § 811(b). From the critical standpoint of individual liberty, therefore, the permanent provisions provide an important check on prosecutorial power by insisting on an approval from a second official, who has no special concern with criminal law enforcement.

The Justice Department itself has affirmed the importance of separating the crime-defining and prosecutorial functions within the Executive Branch. As the Deputy Attorney General explained to Congress in 1983, "separation of the prosecutorial function from investigatory and regulatory functions has proven to be helpful in

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authorizes the Attorney General to supervise and direct the United States Attorneys in their functions; Section 518(b) authorizes the Attorney General to assign any case to any other officer of the Department of Justice; and Section 533 authorizes the Attorney General to appoint officials to detect and prosecute crimes. *See* Exec. Order No. 11396, 33 Fed. Reg. 2689 (1968) ("the Attorney General, as the chief law officer of the Federal Government, is charged with the responsibility for all prosecutions for violations of the Federal criminal statutes"); Fed. R. Crim. P. 48 (permitting dismissal of indictment, information, or complaint by the "Attorney General or the United States attorney").

As far as we are aware, the only congressionally permitted exception to the exclusive control over prosecutions exercised by the Attorney General is the independent counsel statute, 28 U.S.C. §§ 591-599. The independent counsel, of course, has no authority to promulgate rules of any sort, much less rules whose violation constitutes a crime. *See also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (courts may appoint private counsel to prosecute contempt).

assuring that litigation is initiated upon an objective, independent evaluation of the factual and legal basis of each case. This separation of functions ultimately results in better, more efficient government and the confidence of the public and the courts which the Department of Justice has earned." *Hazardous Waste Control and Enforcement Act of 1983*, Hearings before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 389 (1983) (letter from Deputy Attorney General Schmults). Similarly, three former Attorneys General explained to this Court in 1987, speaking particularly of criminal prosecutions: "One of the important functions of the Department of Justice is to provide a counterweight to government agencies that pursue a single programmatic mission." Brief for Edward H. Levi, Griffin B. Bell, and William French Smith as Amici Curiae, in *Morrison v. Olson*, 487 U.S. 654 (1988), at 14. *See also Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967) (emphasizing the difference between allowing agency to "implement its policy directly" and requiring that the "Attorney General must authorize criminal and seizure actions"). This important structural need for a prosecutorial check on executive rulemaking, of course, does not disappear simply because the rulemaking agency happens to be the Department of Justice.

3. The present aggregation cannot be justified on the ground of "practical necessity," which has been the controlling consideration in this Court's decisions rejecting claims of impermissible delegations. *See, e.g., J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. at 406 ("In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination."). In the first place, as noted earlier, petitioners' challenge does not go to the specificity of the standards pursuant to which Congress delegated this authority.

Consequently, the general recognition that "in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives" (*Mistretta*, 109 S. Ct. at 654) has no application here.[14]

Moreover, although the need for flexibility and expertise may well justify delegation of the temporary scheduling power to some executive officer (*see Mistretta*, 109 S. Ct. at 654-55; *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607, 674-75 (1980) (Rehnquist, J., concurring)), there plainly is no necessity for that authority to be vested in the Attorney General. On the contrary, there is an obvious alternative here—the Secretary of HHS. In addition to his scientific expertise in this field, the Secretary is directly and actively involved in the permanent scheduling process and thus is familiar with the problems and exigencies that might warrant emergency action. And to the extent that the Justice Department has relevant law-enforcement considerations to bring to bear on the decision, there is no reason why it cannot communicate its views to the Secretary.

Delegation to the Secretary of HHS would thus provide a vital, independent check on the prosecutor. At the same time, it need not be any less efficient than the process Congress has chosen. Even if it were somewhat less efficient, however, that small burden would hardly be sufficient reason to depart from the Constitution's guarantee of a government of separated powers. As the Court explained in a recent separation-of-powers case, "the fact

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[14] In view of the practical necessity for broad delegation criteria, this Court has uniformly rejected delegation claims since its 1935 decisions in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935), and *A.L.A. Schecter Poultry Co. v. United States*, 295 U.S. 495, 532-33 (1935). *See, e.g., Fahey v. Mallonee*, 332 U.S. 245 (1947); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Mistretta v. United States*; *Skinner v. MidAmerica Pipeline Co.*

that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . ." *INS v. Chadha*, 462 U.S. at 944.

4. The foregoing arguments would, we believe, invalidate any delegation of unilateral crime-defining power to the Nation's chief prosecutor. That is so regardless of whether Congress had authorized the courts to review the exercise of that power. Even with judicial review, the dangers of unilateral, discretionary choice in targeting individuals—coupled with the choice about which substances to schedule, made without the agreement of another Branch or officer, and perhaps with little development of a record for judicial review—is constitutionally unacceptable.

The temporary scheduling provisions, however, do not stop at combining the crime-defining and prosecutorial functions. They go on to insist that the Third Branch, the Judiciary, cannot review the product of this enormous aggregation of power. The result is that the combined powers are, in practical effect, entirely discretionary and plenary. It is hard to imagine a more fundamental departure from the constitutional guarantee of three separated Branches that would mutually check each other to preserve liberty. Thus, even if this unprecedented aggregation of criminal law powers in the Attorney General were not, by itself, unconstitutional, the simultaneous elimination of judicial review would render it invalid. Indeed, as we now argue, judicial review is constitutionally indispensable to the validity of any delegation of crime-defining powers, regardless of which executive official receives them.

B. Congressional Delegations of Criminal Lawmaking Power Must Authorize Judicial Review To Ensure That the Executive Is Acting In Accordance With The Necessary Substantive Standards Established by Congress.

The temporary scheduling statute, in paragraph (1) of 21 U.S.C. § 811(h), grants the Attorney General the power to declare substances illegal for up to 18 months, applying a standard of "imminent hazard to the public safety."[15] The statute then insulates that power from judicial scrutiny by declaring: "An order issued under paragraph (1) is not subject to judicial review." 21 U.S.C. § 811(h)(6). The statute thus permits "the Attorney General [to] act[] with unfettered discretion when making temporary scheduling decisions; he could add a substance as innocuous as aspirin to Schedule I and his decision could not be challenged." *United States v. Widdowson*, 916 F.2d 587, 591 (10th Cir. 1990). This preclusion of judicial review is unconstitutional.

1. The centrality of judicial review to the validity of congressional delegations of lawmaking authority follows directly from this Court's explanation of the delegation doctrine itself. Thus, the Court has insisted that any such delegation be made in accordance with "'an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Mistretta v. United States*, 109 S. Ct. at 654 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The primary purpose of that requirement, in turn, is to enable "a court [to] 'ascertain whether the will of Congress has been obeyed.'" *Skinner v. Mid-America Pipeline Co.*, 109 S. Ct. at 1731

[15] In applying that standard, the Attorney General is required to consider the substance's "history and current pattern of abuse," the "scope, duration, and significance of abuse," and "[w]hat, if any, risk there is to the public health," "including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." 21 U.S.C. § 811(c)(4)-(6), (h)(3).

(quoting *Yakus v. United States*, 321 U.S. at 426); *see also Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. at 686 (Rehnquist, J., concurring); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).[16]

Without judicial review, the bedrock constitutional requirement of an intelligible principle to constrain executive rulemaking would become nothing more than a paper guarantee, and the delegation doctrine could no longer serve its purpose of ensuring, through the independent judgment of the Judicial Branch, that the Executive's rulemaking stays within "the boundaries of [its] delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). But that is an intolerable result: at least when individual liberty is at stake, legislative standards cannot be treated as merely precatory, with citizens who may be subject to criminal prosecution being asked simply to trust in the Executive's compliance with the law. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws" in the courts when threatened with the imposition of government power. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-71 (1986).

The practical effect of denying judicial review in the present circumstances illustrates its constitutional necessity. In addition to the potential for scheduling drugs that should not be criminalized at all, there is perhaps an even greater potential for misusing the temporary scheduling authority—which allows only a Schedule I designation—to criminalize as the most serious drug a substance

[16] An additional purpose of the "intelligible principle" requirement is that "it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people." *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

(such as marijuana) that could properly be criminalized only at a less serious level. The consequences to defendants of even the latter sort of illegal action can be a substantial increase in years spent in prison. *See* 21 U.S.C. § 841(b). Yet the temptation to pursue that course must be strong for an Attorney General who is concerned about a particular substance and has only the Schedule I authority at his immediate disposal.[17]

In the face of this kind of potential for abuse, the experience of judicial review under the permanent scheduling provisions, though sparse, suggests that such review can in fact provide a meaningful check on Executive excess. Aside from the deterrent effect that judicial review may have on an overeager prosecutor, at least one order permanently criminalizing a substance has been successfully challenged by a university researcher on the ground that the DEA Administrator had applied the wrong criteria. *Grinspoon v. DEA*, 828 F.2d 881 (1st Cir. 1987); *cf. Reckitt & Colman, Ltd. v. Administrator, DEA*, 788 F.2d 22 (D.C. Cir. 1986) (rejecting distributor's challenge to permanent scheduling of drug). The risks of erroneous decision must be even greater where, as with the temporary scheduling provisions, the agency process is less thorough, more hurried, and not made in the shadow of eventual judicial review.

2. The court of appeals in this case, recognizing the constitutional difficulties caused by the temporary scheduling statute's bar on judicial review, tried to salvage the statute by stating: "[w]e do not foreclose the possibility that a defendant could raise, as a matter of due process, the defense that a substance was improperly scheduled

[17] This is hardly a fanciful concern. Another drug was put on Schedule I under the temporary scheduling provisions, even as an HHS Administrative Law Judge, acting under the permanent scheduling provisions, was in the process of deciding that the drug "must be categorized as a Schedule III substance." *United States v. Pees*, 645 F. Supp. 697, 700 (D. Colo. 1986).

because it does not fit within the standards that Congress established." J.A. 33 n.2. *Cf. United States v. Caudle*, 828 F.2d 1111 (5th Cir. 1987) (upholding post-indictment procedural challenge to temporary scheduling order without discussing statutory bar on judicial review). But even aside from the Third Circuit's failure to explain whether (and why) all or perhaps only some statutory violations would constitute due process violations,[18] the court's equivocal suggestion is simply an impermissible attempt to rewrite the statute. The language prohibiting judicial review gives no hint of such an exception to its absolute terms. In short, despite the "strong presumption" in favor of construing a statute to permit judicial review (*Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)), there is no basis for so reading the temporary scheduling provisions. *See Briscoe v. Bell*, 432 U.S. 404 (1977) (statute providing that agency determinations "shall not be reviewable in any court" precludes judicial review); *compare McNary v. Haitian Refugee Center, Inc.*, No. 88-1332 (Feb. 20, 1991) (bar on review of "a determination respecting an application" does not apply to general collateral challenges to systemic agency practices and policies); *Bowen v. Michigan Academy of Family Physicians*, *supra* (similar).[19]

[18] The court stated only that "[a]rguably, such a [due process] defense might be raised by a defendant who was convicted for manufacture, distribution or possession of a temporarily scheduled drug that was later removed from the schedule because it did not meet the criteria for permanent scheduling of prohibited substances." J.A. 33 n.2.

[19] If a right to judicial review were to be read into the statute, that should not be a basis for affirming petitioners' convictions. When the Attorney General scheduled the drug at issue here, he certainly must have thought that his actions were immune from judicial challenge. (Indeed, at no point in these proceedings has the United States ever acknowledged that the statute permits judicial review of scheduling orders to test their compliance with congressional standards.) Given the unique structural nature of a separation-of-powers claim, we believe that the appropriate standard for test-

In any event, the court of appeals' attempt to salvage the statute fails on its own terms. Whether or not the temporary scheduling provisions are read to permit judicial review as a defense to a prosecution, the statutory bar clearly precludes pre-prosecution review of the validity of any scheduling decision. That defect renders the statute's delegation invalid. For judicial review to serve its structural function, it must be available at a time that enables delegated legislative authority to be checked before it bears too heavily on individual liberty. Post-indictment review does not satisfy that requirement for several reasons.[20]

To begin with, the prospect of being subject to a criminal investigation and prosecution exacts a heavy toll, not only in fear and anxiety but in foregone activity that might be entirely lawful and indeed beneficial.[21] With the launching of a criminal investigation, moreover, an individual's privacy may be breached by the conduct of searches of his person, home, or office; his telephone may be wiretapped; and his papers and other possessions may be seized. The target may be summoned to appear before a grand jury. His friends, family, and associates

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ing the constitutional validity of the Attorney General's scheduling decision should look to the constraints under which he thought he was operating, and not those that are later read into the statute.

[20] This Court recently made a related point in *McNary v. Haitian Refugee Center, Inc., supra.* In holding that immediate judicial review of undocumented aliens' statutory and constitutional claims against the INS was available, the Court explained that forbidding review except in a challenge to a deportation order would be "tantamount to a complete denial of judicial review for most undocumented aliens." Slip Op. at 16.

[21] For that reason, declaratory judgments are generally available to test the validity of a criminal law if the threat of prosecution is not imaginary and speculative and if the issue is otherwise capable of judicial resolution. *See, e.g., Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 302 (1979); *Doe v. Bolton,* 410 U.S. 179, 188 (1973) (doctor "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief").

may be contacted by investigators or themselves subjected to searches, wiretaps, and summonses. Even before any arrest, therefore, great damage may be done to an individual and his reputation, and great expense might have to be incurred for the assistance of counsel.

An arrest or indictment starts an even more onerous process. "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion,* 404 U.S. 307, 320 (1971); *see Barker v. Wingo,* 407 U.S. 514, 533 (1972); *Klopfer v. North Carolina,* 386 U.S. 213, 222 (1967). The defendant may be detained in jail pending trial, and in addition to the terror of unwarranted imprisonment, "time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." *Barker v. Wingo,* 407 U.S. at 532. Even if out on bail awaiting trial, the indictment itself "may subject [the defendant] to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." *Klopfer v. North Carolina,* 386 U.S. at 222. In short, "[e]ven if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 814 (1987).

If judicial review of the validity of an Attorney General's criminal rule were unavailable except as a defense to a prosecution, all of the foregoing "oppression" (*Klopfer,* 386 U.S. at 222) would be suffered before there had been any opportunity for a judicial check on the propriety of the Executive's crime-creating decision that enabled the Attorney General to pursue these intrusive actions.

Of course, if the trial judge rejected the challenge, full-scale review at the appellate level would not be available until after the defendant had also undergone the rigors and anxieties of being tried and, if convicted, sentenced. The threat of being subjected to even a small part of these enormous burdens represents just the sort of exercise of governmental power over individuals that the constitutional separation of powers is designed to check. It would make a mockery of that guarantee to allow delegated criminal law-making powers to inflict those burdens on individuals before there was any opportunity to check whether the delegated authority had been properly exercised.

3. Like the combining of crime-defining and crime-prosecuting power, the preclusion of pre-prosecution judicial review of a criminal prohibition adopted by the Executive Branch is, to our knowledge, utterly unprecedented in the Nation's history. That historical fact alone forcefully demonstrates Congress's recognition of the fundamental importance of such review to the protection of individual liberty. Indeed, that general recognition has even been expressed with respect to the drug scheduling power in particular. Thus, in enacting the permanent scheduling provisions, 21 U.S.C. § 812 *et seq.*, which do allow for pre-enforcement judicial review, Congress highlighted that feature in response to the "concern [that] has been expressed before Congress with respect to the authority vested in the Attorney General regarding the scheduling and rescheduling of controlled dangerous substances." S. Rep. No. 613, 91st Cong., 1st Sess. 9 (1969).

Similarly, although the novelty of Congress's action in precluding review here means that this Court has never had to decide the issue, there is much in its opinions and those of its Members supporting a requirement of pre-prosecution judicial review of crime-defining rules. As a general matter, the Court has indicated that delegations of criminal rulemaking authority present heightened con-

stitutional concerns. For example, in *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947), the Court stressed that both cases in which the Court had struck down congressional delegations involved the "power to make federal crimes of acts that never had been such before." The Court recently reaffirmed the same point by relying on the important difference between the authority to set sentencing guidelines and the authority to "make crimes of acts never before criminalized." *Mistretta v. United States*, 109 S. Ct. at 655 n.7. *See id.* at 667 ("Guidelines . . . do not bind or regulate the primary conduct of the public"). *See also United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("deficiencies connected with vague legislative directives . . . are far more serious when liberty . . . [is] at stake") (citations omitted).

With respect to the specific issue presented here, moreover, Justice Harlan expressed the opinion that the failure to authorize pre-enforcement judicial review of Executive rules or policies carrying criminal penalties "would raise serious constitutional problems." *Oestereich v. Selective Serv. Sys., Local Bd. No. 11*, 393 U.S. 233, 243 (1968) (Harlan, J., concurring). *See also id.* at 240 (construing Selective Service Act to allow pre-induction judicial review). The Court itself had recognized the Term before *Oestereich* that post-indictment "review is beset with penalties and other impediments rendering it inadequate as a satisfactory alternative to [pre-enforcement review]." *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967). *See also Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-53 (1967).[22]

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[22] The Court in *Abbott Laboratories*, after setting forth various reasons why post-enforcement review was not adequate, stated that pre-enforcement review was required "absent a statutory bar." 387 U.S. at 153. That statement, made in a context where there was no statutory bar, does not purport to decide whether a statutory bar on pre-enforcement review would be constitutional. Of course, Justice

Furthermore, in those cases where the Court has upheld criminal lawmaking delegations, it has placed heavy emphasis on the opportunity for judicial review, which Congress had provided for *prior* to enforcement. For example, in *Yakus v. United States*, the Court held that it was itself "unable to find . . . an unauthorized delegation of legislative power," precisely because the Price Administrator was required to prepare a written "statement of the considerations" supporting his decision and, therefore, "Congress, the courts and the public [can] ascertain whether the Administrator . . . has conformed to [the standards prescribed by the Act]." 321 U.S. at 426.[23] And in *United States v. Rock Royal Co-Op*, 307 U.S. 533, 576 (1939), the Court, noting that the statute provided for pre-indictment judicial review, explained that "[e]ven though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority." [24]

Harlan, who wrote for the Court in *Abbott Laboratories*, insisted just one year later that preclusion of pre-enforcement review "would raise serious constitutional problems." *Oestereich v. Selective Serv. Sys., Local Bd. No. 11*, 393 U.S. 233, 243 (1968) (Harlan, J., concurring).

[23] In *Yakus*, the Court held that the provision of pre-indictment judicial review was constitutionally sufficient and that, therefore, Congress could prohibit post-indictment review. 321 U.S. at 431-37. The validity of that holding has subsequently been called into question. *See, e.g., Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring) (*Yakus* may rest on unique "war emergency" powers of Congress); *cf. United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) (post-indictment judicial review of earlier deportation order constitutionally required).

[24] The importance of pre-enforcement judicial review has also been emphasized in the court of appeals' decisions upholding the permanent scheduling provisions of the Controlled Substances Act against separation-of-powers challenges. Thus, in the first of those decisions, *United States v. Pastor*, 557 F.2d 930 (2d Cir. 1977), the court concluded that the Attorney General's discretion was not "unfettered," because, among other things, he was subject to the requirements of the Administrative Procedure Act, including its provision for judicial review: "These checks on the actions of the Attorney General provide sufficient assurance that his dual role will not be used unfairly." *Id.* at 941. *See also United States v. Gordon*, 580 F.2d 827, 840 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978) (availability of judicial review, along with defined congressional standards, provide "sufficient safeguards against the arbitrary control of drugs").

The cases relied on by the Third Circuit to support the conclusion that judicial review is dispensable here (J.A. 42) are completely inapposite. None of those cases had anything to do with the regulation of private conduct by criminally enforceable administrative rules. Moreover, the only one of those three cases where judicial review was actually circumscribed—and it was merely delayed, not eliminated—did not involve general rulemaking or the rights of individuals at all.[25] And while the Court did uphold a preclusion of pre-induction review of draft board determinations in *Clark v. Gabriel*, 393 U.S. 256 (1968) (per curiam), that case presented quite different constitutional considerations from those at issue here—not only because review was in fact available by habeas corpus before any criminal prosecution, but also because the case involved a large number of individualized agency decisions that depended on a "determination of fact and an exercise of judgment" in an area affected by military necessity. *Id.* at 258.

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[25] Thus, *Briscoe v. Bell*, 432 U.S. 404 (1977), concerned an individualized determination as to whether a *State* should be subject to the provisions of the Voting Rights Act; even then, the statute authorized a judicial challenge immediately after it was applied. 432 U.S. at 411. The other two cases are even more remote. *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), simply held that *consumers* did not have standing to seek judicial review of milk marketing regulations that were fully reviewable at the instance of those persons who were directly affected by them. And in *Johnson v. Robison*, 415 U.S. 361 (1974), the Court held that judicial review *was* available for the constitutional claim presented and was not eliminated by the statute barring review of certain individualized veterans' benefits determinations. The validity of that statute was not at issue.

4. There is no overriding justification to support the temporary scheduling statute's constitutionally extraordinary requirement that individuals be subjected to the burdens of criminal prosecution without prior opportunity for the Judiciary to review the legality of the criminal rules promulgated by the Attorney General. The only substantive interest even mentioned by the court of appeals in this case was the congressional interest in "prompt effectuation" of temporary scheduling orders. J.A. 42. But that interest is plainly insufficient to justify the preclusion of review here.

First, Congress's interest in prompt implementation of scheduling orders could be adequately accommodated without eliminating judicial review. (Congress's interest in expedition was itself a limited one: it provided for mandatory notice and a 30-day comment period before a drug could be scheduled. 21 U.S.C. § 811(h)(4).) [26] Promptness could be ensured by providing for expedited review of scheduling orders. *See Yakus v. United States*, 321 U.S. at 428-30; *Adamo Wrecking Co. v. United States*, 434 U.S. at 277-78. The pendency of such review, of course, "does not by itself stay the effectiveness of the challenged regulation." *Abbott Laboratories v. Gardner*, 387 U.S. at 156. Indeed, Congress may even have the power to insist that a scheduling order go into effect immediately, while providing for expedited judicial review. *Cf. Yakus v. United States*, 321 U.S. at 431-43 (delegation pursuant to emergency wartime powers can prohibit judicial stay of regulations pending review).

In any event, even if some delay were occasioned by judicial review of scheduling orders, that would not be a constitutionally sufficient justification for dispensing with it. As this Court has previously explained:

[26] In this case, approximately two months elapsed between the proposal to schedule 4-methylaminorex and its final scheduling. *See* 52 Fed. Reg. 30,174, 38,225 (1987). In addition, the drug had been created and patented more than 20 years earlier. *See* note 3, *supra*.

> There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

INS v. Chadha, 462 U.S. at 959 (citation omitted). In sum, the Constitution's structural checks on the exercise of criminal power over individuals cannot properly be eliminated or diluted, as Congress did in enacting the temporary scheduling statute under which petitioners were convicted and sent to prison.

II. THE ATTORNEY GENERAL WAS NOT AUTHORIZED TO SUBDELEGATE HIS TEMPORARY SCHEDULING AUTHORITY TO THE DEA.

Petitioners' convictions should also be reversed because the scheduling decision that formed the basis for their convictions was made by the DEA, which lacked the statutory authority to take such action. The temporary scheduling amendment, by its terms, extends only to the "Attorney General." In view of the importance of the power at issue, it is simply not reasonable to conclude, as did the court below, that Congress intended to allow the Attorney General to rely on any omnibus subdelegation authority to assign his powers to lower level employees of the Justice Department.

Executive subdelegation is permitted to the extent, but only to the extent, that Congress has authorized it. *See, e.g., United States v. Giordano*, 416 U.S. 505, 512-23 (1974); *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 358-67 (1942). In examining particular subdelegations, moreover, the Court has taken a pragmatic approach to

assessing the kind of evidence required to infer the needed authority. Thus, when the power in question is significant, the inquiry is more demanding. *See Giordano*, 416 U.S. at 515-16 (serious nature of wiretap authority suggests the need for "[t]he mature judgment of a particular, responsible Department of Justice official"). *Cf. Cudahy Packing Co. v. Holland*, 315 U.S. at 363-64 (inferring that Congress did not intend to allow subdelegation of administrative subpoena power, based in part on the coercive potential of the power).

In accord with this approach, we believe that the power at issue here is both so vast and so unbridled that congressional authority to subdelegate should be very clear before subdelegation is permitted. Generally speaking, of course, "[d]ue respect for the prerogatives of Congress in defining federal crimes prompts restraint" in assessing the reach of a criminal statute. *Dowling v. United States*, 473 U.S. 207, 213-14 (1985). That same restraint is equally appropriate when Congress delegates its crime-defining authority. The consequences are too important either to assume that Congress wanted low-level functionaries to take on such a task or, for that matter, to allow Congress to achieve such a result without expressly saying so. *See United States v. Widdowson*, 916 F.2d at 593 ("it seems extraordinary to assume that Congress intended to permit the temporary scheduling power to be delegated to a lesser administrator such as the head of the DEA"). *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (due process violated by citizenship requirement for federal employment imposed not by President or Congress but by Civil Service Commission).

The temporary scheduling provisions themselves reflect no congressional intent to permit subdelegation. The statute, by its plain terms, requires that the final decision regarding temporary scheduling be made by the Attorney General. 21 U.S.C. § 811(h)(1) ("If the Attorney General finds [that temporary scheduling is necessary], he may [order such scheduling].") In similarly plain terms, the statute further states that, in making such a decision, "the Attorney General shall be required to consider" specific aspects of the hazard presented. *Id.* § 811(h)(3). On the other hand, the statute contains not the slightest hint that Congress wanted other officials to share the Attorney General's authority.

Despite the express language of the temporary scheduling provisions, the Third Circuit concluded that subdelegation was authorized on the basis of a separate statute, which provides that the Attorney General "may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." 28 U.S.C. § 510. The court of appeals' reliance on section 510 was misplaced. As this Court has previously made clear, "[d]espite § 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated." *Giordano*, 416 U.S. at 514. And here, it simply strains credulity to think that Congress would have intended that such an important power would be exercised by "any employee" of the Justice Department, as section 510—which was enacted long before Congress had ever given any crime-defining authority to the Attorney General—would allow. "The decision to bypass ordinary safeguards against error and instead weigh only actual abuse, diversion and clandestine activities to determine whether temporary scheduling 'is necessary to avoid an imminent hazard to the public safety,' seems peculiarly a decision for an official of cabinet rank." *Widdowson*, 916 F.2d at 594 (citation omitted).

For the same reason, the subdelegation provision contained in the Comprehensive Drug Abuse and Control Act of 1970, 21 U.S.C. § 871(a)—which was not relied on by the Third Circuit—does not support subdelegation of the temporary scheduling authority. As previously noted, the

exercise of the permanent scheduling authority provided for in the 1970 statute itself was quite different from the temporary authority added in 1984: it was subject to a veto by the Secretary of HHS as well as formal rule-making procedures and judicial review. When Congress eliminated all of those requirements in the temporary provisions, it can hardly be supposed that Congress intended the new, unprecedented power to be exercised by "any officer or employee of the Department of Justice." 21 U.S.C. § 871(a). In the absence of some clear evidence to the contrary, Congress should not be understood to have authorized such a broad subdelegation of the unilateral and unreviewable power to criminalize lawful conduct.

In sum, the temporary scheduling provisions were meant to be exercised only by the Attorney General. His decision to subdelegate that power to the DEA was thus impermissible.

CONCLUSION

The judgments against petitioners should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

FOOD AND DRUGS—DRUG ABUSE PREVENTION TEMPORARY SCHEDULING TO AVOID IMMINENT HAZARDS TO PUBLIC SAFETY 21 U.S.C. § 811(h)

(1) If the Attorney General finds that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to the requirements of subsection (b) of this schedule relating to the Secretary of Health and Human Services, schedule such substance in schedule I if the substance is not listed in any other schedule in section 812 of this title or if no exemption or approval is in effect for the substance under section 355 of this title. Such an order may not be issued before the expiration of thirty days from—

(A) the date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, and

(B) the date the Attorney General has transmitted the notice required by paragraph (4).

(2) The scheduling of a substance under this subsection shall expire at the end of one year from the date of the issuance of the order scheduling such substance except that the Attorney General may, during the pendency of proceedings under subsection (a)(1) of this section with respect to the substance, extend the temporary scheduling for up to six months.

(3) When issuing an order under paragraph (1), the Attorney General shall be required to consider, with respect to the finding of an imminent hazard to the public safety, only those factors set forth in paragraphs (4), (5), and (6) of subsection (c) of this section, including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution.

(4) The Attorney General shall transmit notice of an order proposed to be issued under paragraph (1) to the Secretary of Health and Human Services. In issuing an order under paragraph (1), the Attorney General shall take into consideration any comments submitted by the Secretary in response to a notice transmitted pursuant to this paragraph.

(5) An order issued under paragraph (1) with respect to a substance shall be vacated upon the conclusion of a subsequent rulemaking proceeding initiated under subsection (a) of this section with respect to such substance.

(6) An order issued under paragraph (1) is not subject to judicial review.

DEPARTMENT OF JUSTICE DRUG ENFORCEMENT ADMINISTRATION: GENERAL FUNCTIONS
28 C.F.R. § 0.100

The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Administrator of the Drug Enforcement Administration:

(a) Functions vested in the Attorney General by sections 1 and 2 of Reorganization Plan No. 1 of 1968.

(b) Functions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended. This will include functions which may be vested in the Attorney General in subsequent amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970, and not otherwise specifically assigned or reserved by him.

(c) Functions vested in the Attorney General by section 1 of Reorganization Plan No. 2 of 1973 and not otherwise specifically assigned.

FOR ARGUMENT

(6)

No. 90-6282

In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL TOUBY AND LYRISSA TOUBY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether Section 201(h) of the Controlled Substances Act unconstitutionally delegates to the Attorney General the authority to list a drug temporarily as a schedule I controlled substance.

2. Whether the Attorney General lawfully delegated his authority under Section 201(h) to the Administrator of the Drug Enforcement Administration.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 27-66) is reported at 909 F.2d 759. The opinion of the district court (J.A. 2-26) is reported at 710 F. Supp. 551.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1990. A petition for rehearing was denied on August 21, 1990. The petition for a writ of certiorari was filed on November 19, 1990, and was granted on January 14, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

Section 201(h) of the Controlled Substances Act, 21 U.S.C. 811(h), and 28 C.F.R. 0.100(b) are set out in Appendix A to this brief.

STATEMENT

Section 201(h) of the Controlled Substances Act, 21 U.S.C. 811(h), provides the Attorney General with a streamlined procedure for temporarily listing a drug as a schedule I controlled substance when he finds that the action is "necessary to avoid an imminent hazard to the public safety." On October 15, 1987, the Attorney General's delegate, the Administartor of the Drug Enforcement Administration (DEA), used that authority to list 4-methylaminorex—a stimulant known in street vernacular as "Euphoria"—temporarily as a schedule I controlled substance pending proceedings for permanent listing. While the temporary listing was in effect, petitioners Daniel and Lyrissa Touby were arrested and charged under the Controlled Substances Act with conspiring to manufacture and knowingly manufacturing 4-methylaminorex. Petitioners do not contend that Euphoria cannot be listed as a schedule I controlled substance, and since their arrest the drug has been permanently listed as such. They challenge their convictions solely on the theory that the Controlled Substances Act's temporary listing provisions unconstitutionally delegate legislative power to the Executive Branch and, alternatively, that the Attorney General unlawfully delegated his authority under the statute to the Administrator of the DEA.

A. The Controlled Substances Act

1. In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236. Title II of that enactment, known as the Controlled Substances Act (CSA), regulates the importation, manufacture, distribution, possession, and improper use of substances that have a detrimental effect on public health and welfare. See CSA § 101, 21 U.S.C. 801. It establishes five schedules of controlled substances, includes a list of substances initially placed on each schedule, and contemplates the periodic reevaluation of the initial lists and the addition of other substances to the schedules. See

CSA § 202, 21 U.S.C. 812. Once a substance is placed on one of the schedules, manufacturers, distributors, and dispensers of the substance must comply with various regulatory requirements. See CSA §§ 301-310, 21 U.S.C. 821-830. Unauthorized possession of the substance with intent to distribute it is a criminal offense. CSA § 401(a), 21 U.S.C. 841(a).[1]

Section 201(a) of the Act, 21 U.S.C. 811(a), grants the Attorney General authority to add substances to the schedules of controlled substances through a rulemaking on the record pursuant to provisions of the Administrative Procedure Act, 5 U.S.C. 553(c), 556, 557. Section 201(b) requires the Attorney General to receive the recommendation of the Secretary of Health and Human Services (HHS) before initiating such a rulemaking respecting a substance proposed for scheduling as a controlled substance. 21 U.S.C. 811(b). The Secretary's recommendations are controlling as to scientific and medical matters, and a substance cannot be placed on the schedules if the Secretary recommends against listing it. Section 201(c) identifies eight factors that the Attorney General and the Secretary of HHS must consider in making their determinations whether a substance should be listed on a controlled substance schedule. 21 U.S.C. 811(c).[2]

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[1] Petitioners focus exclusively on how the five schedules affect the gradation of criminal penalties applicable to illegal possession or distribution of controlled substances. Pet. Br. 3. Certain of the regulatory requirements of Sections 301-310 also apply differently to the five schedules.

[2] Section 201(c) requires consideration of the following factors relating to the substance under consideration:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

Section 202(b) of the Act identifies the specific criteria for adding a substance to each of the schedules. With exceptions not pertinent here, that provision states that "a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance." 21 U.S.C. 812(b). The findings required to add a substance to schedule I are as follows:

> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
>
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

CSA § 202(b)(1), 21 U.S.C. 812(b)(1). Thus, to add a substance to schedule I, the Attorney General must determine through a rulemaking that the substance meets those three criteria in light of the eight factors identified in Section 201(c), 21 U.S.C. 811(c). The scheduling of a substance under Sections 201(a) and 202(b) is subject to judicial review in a court of appeals upon petition by any "aggrieved" person. See CSA § 507, 21 U.S.C. 877.[3]

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(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

21 U.S.C. 811(c).

[3] Aggrieved persons would include manufacturers, distributors, and dispensers subject to the regulatory restrictions of Sections 301 through 310. That class includes petitioners and others who propose to engage in those activities without complying with the regulatory restrictions.

2. In 1984, Congress enacted the Comprehensive Crime Control Act, which amended the Controlled Substances Act in various respects. See Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, Tit. II, ch. V, 98 Stat. 2068. Among the amendments, Congress added a new subsection, Section 201(h), to the Controlled Substances Act. That new subsection, codified at 21 U.S.C. 811(h), establishes an expedited procedure for temporarily listing a schedule I substance when the Attorney General finds that such expedition "is necessary to avoid an imminent hazard to the public safety." Section 201(h) "is designed to allow the Attorney General to respond quickly to protect the public from drugs of abuse that appear in the illicit traffic too rapidly to be effectively handled under the lengthy routine control procedures." S. Rep. No. 225, 98th Cong., 1st Sess. 264-265 (1983).

Section 201(h)(3) directs the Attorney General to make the "imminent hazard" determination based on three factors: (1) the drug's history and current pattern of abuse; (2) the scope, duration, and significance of abuse; and (3) the risk to the public health, giving specific consideration to "actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." 21 U.S.C. 811(h)(3) (incorporating 21 U.S.C. 811(c)(4), (5) and (6)). Section 201(h), however, does not dispense with the requirement that a drug listed on schedule I have the characteristics of a schedule I controlled substance. Hence, to list a substance temporarily on schedule I, the Attorney General must not only make the Section 201(h) "imminent hazard" determination that justifies expedited rulemaking; in accordance with Section 202(b)(1), the substance must also exhibit a high potential for abuse, it must have no currently accepted medical use, and there must be a lack of accepted safety for its use under medical supervision. 21 U.S.C. 812(b)(1).[4]

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[4] Accordingly, we disagree with petitioners' statements (Br. 5-6, 14 n.9) that Section 202(h) requires only an "imminent hazard"

Before issuing an order listing a substance of a temporary basis under Section 201(h), the Attorney General must publish a notice of proposed listing in the Federal Register and transmit a notice of the proposed order to the Secretary of HHS. CSA § 201(h)(1)(A) and (B), (h)(4), 21 U.S.C. 811(h)(1)(A) and (B), (h)(4). The Attorney General must then wait 30 days after the Federal Register notice and the HHS transmittal before issuing the order. In deciding whether to list a substance following this 30-day period, the Attorney General must take into account any comments submitted by the Secretary of HHS, but the prior approval of the Secretary is not required, as would be the case for a permanent listing. CSA § 201(h)(4), 21 U.S.C. 811(h)(4); compare CSA § 201(b), 21 U.S.C. 811(b).

A Section 201(h) temporary listing expires at the end of one year except that, if the Attorney General has instituted rulemaking proceedings for the permanent listing of the substance under Section 201(a), the Attorney General may extend the temporary listing for up to six months. CSA § 201(h)(2), 21 U.S.C. 811(h)(2). In any event, the temporary listing expires upon the completion of permanent rulemaking respecting the listing of the substance. CSA § 201(h)(5), 21 U.S.C. 811(h)(5). Subsection 201(h)(6) provides that the Attorney General's order temporarily listing a drug as a schedule I substance "is not subject to judicial review." 21 U.S.C. 811(h)(6). This provision postpones the special statu-

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determination to list a substance in schedule I through expedited rulemaking. As the court of appeals stated, Section 202(b)(1)'s three schedule I criteria are "independent of the factors which section [201(h)] requires the Attorney General to consider in exercising the designated temporary scheduling power." J.A. 38. The Attorney General's determination that the drug poses an "imminent hazard," however, will generally satisfy the first criterion, while his determination that there is no FDA exemption or approval in effect for the drug, see 21 U.S.C. 811(h)(1), will satisfy the second and third criteria. See *Grinspoon* v. *DEA*, 828 F.2d 881, 889 (1st Cir. 1987).

tory review mechanism set forth in Section 507—which, as we have explained, provides "aggrieved parties" with judicial review in the appropriate court of appeals—until the conclusion of permanent rulemaking procedures. See CSA § 507, 21 U.S.C. 877.[5]

3. Congress has provided, through Section 4(c) of the Act of Sept. 6, 1966, ch. 31, 80 Stat. 612, that the Attorney General "may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." 28 U.S.C. 510. In addition, Section 501(a) of the Controlled Substances Act provides that the "Attorney General may delegate any of his functions under [the control and enforcement subchapter of the Act] to any officer or employee of the Department of Justice." 21 U.S.C. 871(a).

In 1973, the Attorney General delegated the performance of his duties under the Controlled Substances Act, including the scheduling of drugs, to the Administrator of the DEA. 38 Fed. Reg. 18,380. See 28 C.F.R. 0.100(b) (1986). That delegation was amended in 1987 to clarify that it included the authority to schedule substances on a temporary basis under the expedited procedures of Section 201(h). 52 Fed. Reg. 24,447. See 28 C.F.R. 0.100(b).[6]

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[5] For the reasons discussed below, at pp. 33-36, Section 201(h)(6) does not preclude a court from determining whether a designated drug is properly listed as a schedule I substance in the course of a criminal enforcement proceeding. Accordingly, we disagree with petitioners' contrary characterizations of the statute. See Pet. Br. 5, 26-28.

[6] The Attorney General's 1987 subdelegation was issued in response to a court of appeals decision holding that the 1973 subdelegation to the Administrator did not encompass the later-enacted authority conferred by Section 201(h). See *United States* v. *Spain*, 825 F.2d 1426 (10th Cir. 1987).

B. The Temporary Listing Of Euphoria As A Schedule I Controlled Substance

1. On August, 13, 1987, the Administrator of the DEA proposed the temporary listing of 4-methylaminorex (formally known as (±) *cis*-4, 5-dihydro-2-amino-4-methyl-5-phenyl-2-oxazolamine) as a schedule I controlled substance. 52 Fed. Reg. 30,174.[7] The Administrator observed that the drug "is a new substance that is clandestinely produced, that is distributed in illicit traffic, and that produces stimulant effects," and therefore "is certainly the type of drug which Congress intended to be considered for emergency scheduling." *Ibid.* Citing various studies, the Administrator also noted that 4-methylaminorex's pharmacological profile resembles that of amphetamine; that in high doses it produces "seizure activity in the brain and associated convulsions, depression, respiratory failure, and death"; and that the DEA was not aware of any commercial manufacturers or suppliers of the drug or of any approved therapeutic use. *Id.* at 30,175.

The Administrator made the necessary findings for listing under Sections 201(h) of the Controlled Substances Act. He considered the history, pattern, and significance of abuse, and the risk the drug posed to public safety. 52 Fed. Reg. 30,174. See CSA § 201(h)(3), 21 U.S.C. 811(h)(3). He also identified the characteristics necessary to qualify the substance for schedule I listing, referring to "the potent stimulant and toxic actions of the substance, and the lack of accepted medical use or established safety for the use of 4-methylaminorex." 52 Fed. Reg. at 30,174. See CSA § 202(b)(1), 21 U.S.C.

[7] The (±) prefix indicates that the listed substance is actually a mixture of two optical isomers. Under the Controlled Substances Act's definitions, the listing of 4-methylaminorex includes the substance's individual optical isomers. See CSA § 102(14), 21 U.S.C. 802(14); 21 C.F.R. 1308.02(c) and 1308.11(f). In addition to its street name and formal chemical name, 4-methylaminorex is also identified in pharmacology studies as "U4Euh," "ICE," and "McN-822."

812(b)(1). Based on a consideration of the factors required by Section 201(h)(3), as well as the finding that the drug qualified as a schedule I controlled substance under Section 202(b)(1), the Administrator concluded that listing 4-methylaminorex in schedule I, at least on a temporary basis, was "necessary to avoid an imminent hazard to the public safety." 52 Fed. Reg. 30,175. Pursuant to Section 201(h)(4), the Administrator notified the Assistance Secretary of Health and Human Services of the proposed scheduling. *Ibid.*

2. On October 15, 1987, the Administrator published an order temporarily listing 4-methylaminorex as a schedule I controlled substance, effective on that date. 52 Fed. Reg. 38,225. In response to the notice of intent to schedule the drug, the Food and Drug Administration (FDA) of HHS had advised the DEA that it had no objections to the schedule I listing of the substance. *Ibid.* No comments were received from any other interested parties. *Ibid.* Based on the information discussed in the August 13 notice of proposed listing, the Administrator stated his finding that the temporary listing of the drug as a schedule I controlled substance was necessary to avoid an imminent hazard to the public safety. *Id.* at 38,225-38,226. The notice specifically warned that any unauthorized activity respecting the drug was henceforth unlawful and subject to criminal penalties. *Ibid.*

3. On October 13, 1988, the Administrator extended the duration of the temporary listing for an additional six months, through April 15, 1989, or until completion of rulemaking proceedings to schedule the drug on a permanent basis, whichever occurred first. 53 Fed. Reg. 40,061. The next day, he issued a notice of intent to schedule the drug permanently. 53 Fed. Reg. 40,391.[8] On April 13, 1989, 4-methylaminorex was permanently

[8] That decision was based, in part, on a recommendation by the DEA's Drug Control Section. See 53 Fed. Reg. 40,391. We have reprinted that recommendation, which is part of the administrative record, as an appendix to this brief. See App. B, *infra*.

listed as a schedule I controlled substance after the completion of rulemaking under Section 201(a). 54 Fed. Reg. 14,799.

C. The Facts And Proceedings In This Case

1. On January 5, 1989, police officers in Wanaque, New Jersey, arrested petitioners after they purchased a television set with a counterfeit cashier's check. A search incident to the arrest found petitioners to be in possession of marijuana and drug paraphernalia. Based on further investigation, a warrant was obtained to search petitioner's home for counterfeiting materials and drugs. When DEA agents executed the warrant on January 6, 1989, they discovered a fully operational drug laboratory in petitioners' bedroom. Among the items seized were papers containing the formula for manufacturing 4-methylaminorex. Also seized were mixtures that, upon testing, were found to contain the drug.[9] J.A. 19-21 49-50.

2. On January 11, 1989, a grand jury in the United States District Court for the District of New Jersey returned a two-count indictment charging petitioners with unlawful manufacture of a schedule I controlled substance and conspiracy to manufacture that substance, in violation of the Controlled Substances Act. See CSA §§ 401(a), 406, 21 U.S.C. 841(a), 846. At the time of the alleged offenses, the Administrator of the DEA had temporarily listed 4-methylaminorex as a schedule I controlled substance pursuant to Section 201(h), but he had not completed the rulemaking for permanent listing of the substance. J.A. 2, 28.

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[9] In September 1988, Daniel Touby had purchased cyanogen bromide from the Eastman Kodak Company. In October 1988, Lyrissa Touby had obtained sodium acetate, sodium carbonate, potassium carbonate, and norephedrine hydrochloride from a chemical supplier. Expert testimony established that those chemicals are used to make 4-methylaminorex. J.A. 49.

Petitioners challenged the constitutionality of Section 201(h) in a pretrial motion to dismiss the indictment. They contended that Congress had impermissibly delegated to the Attorney General legislative power to criminalize activity concerning 4-methylaminorex by authorizing him to list the drug as a schedule I controlled substance on a temporary basis. Petitioners also contended that the Attorney General could not in any event delegate his temporary listing authority to the Administrator. The district court rejected both challenges in an opinion dated March 17, 1989. J.A. 11-19. After a jury trial, petitioners were convicted as charged in the indictment. Daniel Touby was sentenced to 42 months' imprisonment and Lyrissa Touby was sentenced to 27 months' imprisonment, each term of imprisonment to be followed by three years' supervised release. J.A. 28.

3. The court of appeals affirmed petitioners' convictions, rejecting their challenges to the temporary scheduling procedure. J.A. 27-54. The court first held that Congress had not impermissibly delegated its legislative power to the Attorney General by authorizing him to list drugs as controlled substances on a temporary basis.[10] J.A. 33-43. It noted that this Court has sustained broad assignments of authority to the Executive Branch, as long as the relevant congressional enactment lays down an "intelligible principle" directing the responsible official's actions. *Id.* at 34-35, quoting *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989), and *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928).

The court rejected petitioners' contention that a more stringent nondelegation standard should be applied in

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[10] The Ninth Circuit reached the same result in *United States* v. *Emerson*, 846 F.2d 541, 545-546 (1988). The Tenth Circuit has held, however, that Section 201(h) is an unconstitutional delegation of legislative power. *United States* v. *Widdowson*, 916 F.2d 587, 589-591 (1990).

this case because Section 201(h) permits the Attorney General to "create" crimes. J.A. 35-38. It explained that this Court has not in fact applied a more stringent test in considering the validity of statutes authorizing administrative regulation of conduct giving rise to criminal liability, J.A. 36-37, and that Section 201(h) does not authorize the Attorney General to define primary criminal conduct, because Congress itself has proscribed the manufacture and possession of controlled substances, while the Attorney General "merely designat[es] the drugs or substances which fall within Congress' general description." J.A. 37-38.

Applying this Court's "intelligible principle" test, the court of appeals concluded that Section 201(h) provides the Attorney General with sufficient guidance for making the "imminent hazard" finding required for temporary listing of substances. J.A. 39-40. The court observed that the statutory standards provide at least as much guidance as the "public interest, convenience, interest, or necessity" standard that was found to be sufficient to guide the Federal Communications Commission in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-227 (1943), or the "excessive profits" standard for renegotiation of wartime contracts that was sustained in *Lichter* v. *United States*, 334 U.S. 742, 783-787 (1948). J.A. 39-40.

Moreover, the court of appeals found that the constitutionality of Section 201(h) was reinforced by the limited scope of the temporary scheduling, which "can be viewed as preliminary to and in aid of the permanent scheduling authority as set forth in section [201(a)]," J.A. 40, and by the practical necessities of the situation confronting Congress. The court observed that Congress had found the permanent listing procedures inadequate to address the situation of "designer drugs" that are similar to listed substances but contain slight variations, and it noted that the purpose of the temporary listing authority is to "avoid an imminent hazard to the public

safety," 21 U.S.C. 811(h)(1), by imposing an "'emergency control'" during the interim between identification of a drug that presents a major abuse problem and the permanent scheduling of the substance—a period during which "'enforcement actions against traffickers [were] severely limited and a serious health problem may arise.'" J.A. 39, 40 (quoting S. Rep. No. 225, *supra*, at 264, 265).

Finally, the court rejected petitioners' contention that Section 201(h)(6)'s limitation on judicial review of an order listing a drug on a temporary basis renders Section 201(h) an unconstitutional delegation of legislative power. J.A. 41-43. The court pointed out that Congress has foreclosed judicial review in a variety of other administrative contexts. J.A. 42-43. It also stated that Section 201(h)(6) does not necessarily bar judicial review of the temporary listing in a criminal prosecution, if the defendant claims that the listing of the particular drug violated the standards in Section 201(h). J.A. 33 n.2, 42-43. But in this case, the court noted, petitioners "do not contend that Euphoria cannot be scheduled as a Schedule I narcotic or that the temporary scheduling of the substance did not meet the standards set forth in 21 U.S.C. § 811(h)." J.A. 33.

The court of appeals next held that Section 4(c) of the Act of September 6, 1966, 28 U.S.C. 510, empowered the Attorney General to delegate his temporary listing authority to the Administrator of the DEA.[11] J.A. 43-46. The court cited the general rule that in the absence of a contrary expression by Congress, powers conferred on an Executive Branch officer may be delegated to a subordinate official, J.A. 45, and it found no support for the proposition that Congress intended *sub silentio* to create an exception to the Attorney General's broad delegation authority under Section 4(c) in the context

[11] The Tenth Circuit has reached the opposite conclusion, holding that the Section 201(h) authority is nondelegable. *United States* v. *Widdowson*, 916 F.2d at 591-593.

of the listing of controlled substances on a temporary basis pursuant to Section 201(h).[12] The court further found that the Attorney General did, in fact, delegate his Section 201(h) authority to the Administrator. J.A. 46-48.

Judge Hutchinson dissented. J.A. 54-66. He agreed with the majority that the record did not suggest that the Attorney General acted arbitrarily or otherwise improperly in temporarily listing Euphoria as a controlled substance under Section 201(h) or that Euphoria is not a danger to the public safety. J.A. 55. Judge Hutchinson also accepted the majority's analysis of the statutory background and the nature of the problem to which Section 201(h) is addressed, J.A. 55, and he concluded that Section 201(h)'s purpose of avoiding "'an imminent hazard to the public safety' is in and of itself an intelligible principle under the teachings of the Supreme Court." J.A. 58, citing *National Broadcasting Co.* v. *United States*, 319 U.S. at 225-226, and *Lichter* v. *United States*, 334 U.S. at 783-787. But Judge Hutchinson nevertheless believed that Section 201(h) unconstitutionally delegates Congress's legislative power because, in his view, it authorizes the Attorney General to define primary criminal conduct and therefore should be subject to a more stringent non-delegation test. J.A. 58-61.[13]

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[12] Because the court found adequate subdelegation authority under Section 4(c), it did not reach the question whether Section 501(a) of the Controlled Substances Act, 21 U.S.C. 871(a), provided an independent basis for such delegation. J.A. 46 n.4.

[13] Because he believed that Section 201(h) is unconstitutional, Judge Hutchinson did not reach the question of the statutory validity of the Attorney General's delegation of his temporary listing authority to the Administrator of the DEA. J.A. 55 n.1.

SUMMARY OF ARGUMENT

1. The Constitution divides and diffuses governmental power among the "three coequal Branches." *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989). This Court's requirement that Congress provide an intelligible principle to guide an executive officer's administration of a statute maintains that separation of powers by assuring that no "legislative power"—as the Constitution uses that term—is delegated to the Executive Branch. Once it is determined, through application of that standard, that Congress has conferred only executive functions, the delegation inquiry is at an end. Separation of powers principles do not prevent Congress from selecting the Attorney General, rather than another Executive Branch official, to perform the executive function. Indeed, Congress had sound policy reasons for vesting the Attorney General with the Section 201(h) temporary listing authority, and the potential for abuse that petitioners posit simply does not exist.

Petitioners are also mistaken in arguing that Section 201(h) is an unconstitutional delegation because Congress has provided inadequate opportunity for judicial oversight of the Attorney General's temporary listing decisions. A temporary listing of a substance is simply the first step in the administrative process for determining whether the substance should be permanently listed. As petitioners recognize, Section 507 of the Controlled Substances Act specifically authorizes judicial review if the substance is permanently listed. 21 U.S.C. 877. Petitioners object, however, that Section 201(h)(6) precludes Section 507 review during the interim period of up to 18 months while the permanent rule is under consideration and the temporary listing is in effect. There is no merit to that objection. Individuals who insist on manufacturing and selling hazardous substances during that interim period may challenge the Attorney General's listing decision in a criminal enforcement pro-

ceeding. The government is not required to stay its hand until the courts have an opportunity to determine whether government is justified in bringing an enforcement action. See *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-599 (1950).

2. Petitioners also argue that the Attorney General lacks statutory authority to delegate his Section 201(h) responsibilities to the Administrator of the DEA. Congress, however, has authorized that subdelegation under two separate statutes. First, Congress has given the Attorney General broad authority to delegate the performance of "any" of his functions to another officer, employee, or agency of the Department of Justice. 28 U.S.C. 510. Second, Congress specifically provided in Section 501(a) of the Controlled Substances Act that the Attorney General "may delegate any of his functions" under the control and enforcement provisions of that Act to any officer or employee of the Department. 21 U.S.C. 871(a). There is no indication in the Controlled Substances Act that Congress intended to except the Attorney General's responsibilities under Section 201(h) from those delegation provisions. The Attorney General accordingly had ample statutory authority to delegate his Section 201(h) responsibilities to the Administrator of the DEA.

ARGUMENT

I. SECTION 201(h) DOES NOT VIOLATE THE CONSTITUTION'S REQUIREMENT THAT "ALL LEGISLATIVE POWERS" SHALL BE VESTED IN CONGRESS

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, § 1. Petitioners contend that Congress has violated that requirement by creating schedules of controlled substances, providing the initial contents of those schedules, and then authorizing the Attorney General to add—temporarily, pending formal rulemaking—other substances that he has identified as posing "an imminent hazard to the public safety." § 201(h), 21 U.S.C. 811(h). Although petitioners contend that Congress's action is "unprecedented" (Br. 15), "strikes at the heart of the system of checks and balances that guarantee the rule of law" (Br. 15) and undermines individual liberty "at its core" (Br. 18), they also recognize that this Court's precedents narrowly restrict the scope of their challenge.

Petitioners accept that "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). They also accept (Br. 12-13, 21) the principle "now enshrined in our jurisprudence" that:

> "In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government coordination."

Mistretta, 488 U.S. at 372, quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928).

Petitioners acknowledge that "Congress has often granted executive departments and agencies the authority to promulgate regulations that govern private con-

duct, and some of the resulting regulations are enforceable through criminal prosecutions." Br. 19. See, *e.g.*, *Yakus* v. *United States*, 321 U.S. 414 (1944); *United States* v. *Grimaud*, 220 U.S. 506 (1911). And they acknowledge, more indirectly (Br. 13 & n.7, 22 n.14, 24), the firmly established rule that

> [s]o long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."

Mistretta, 488 U.S. at 372, quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409.[14]

Petitioners do not claim that Congress has failed to set forth an "intelligible principle" to guide the Attorney General's listing of substances on a temporary or permanent basis. Indeed, they expressly disclaim any challenge to "the specificity of the substantive standards that Congress established to govern the exercise of delegated powers." Br. 13, 21. And, as the court of appeals stated,

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[14] Petitioners also acknowledge (Br. 22 n.14), as recited in *Mistretta*, that this Court's application of the "intelligible principle" test has resulted in rejection of virtually every challenge to legislation on the ground that it unconstitutionally delegated legislative power. 488 U.S. at 373-374. See, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742 (1948) (authority to determine excess profits); *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946) (authority to prevent unfair or inequitable distribution of voting power among security holders); *Yakus* v. *United States*, 321 U.S. 414 (1944) (authority to fix commodity prices at fair and equitable levels); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) (authority to determine just and reasonable rates) *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (authority to regulate broadcast licensing as public interest, convenience, or necessity require). The only two exceptions, *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), involved a statute in which Congress "failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 n.7.

petitioners "do not contend that Euphoria cannot be scheduled as a Schedule I narcotic or that the temporary scheduling of the substance did not meet the standards set forth in 21 U.S.C. § 811(h)." J.A. 33.

Ultimately, petitioners seek an exception to this Court's settled delegation principles based on two points: the Attorney General (rather than some other executive official) exercises the authority conferred under the statute (Br. 14-23); and the statute's temporary listing provisions do not provide for pre-enforcement review (Br. 24-35). As we explain below, Congress's conferral of authority in this case is plainly constitutional under this Court's settled standards and is not, as petitioners suggest, "unprecedented" (Br. 15, 19, 30). The factors that petitioners claim distinguish this case—the identity of the particular executive officer who exercises the delegated authority, and the timing of judicial review—do not call for a different analysis or dictate a different result.

A. Section 201(h) Satisfies Established Delegation Standards

Petitioners face a difficult task in demonstrating that a duly enacted congressional statute is facially unconstitutional. See, *e.g.*, *Mistretta*, 488 U.S. at 384; *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). That task is especially difficult in this case because, as the lower courts held and petitioners concede, Congress's delegation of authority to the Attorney General under Section 201(h) amply satisfies the "intelligible principle" test that this Court has consistently employed to determine the constitutionality of challenged delegations. See *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 218-219, 224 (1989); *Mistretta*, 488 U.S. at 372-374.

1. Sections 201(h) and 202(b) set forth "intelligible" —and indeed quite precise—standards to channel the Attorney General's discretion in identifying substances for temporary listing as schedule I controlled substances. First, the substance must present "an imminent hazard

to the public safety," CSA § 201(h)(1), 21 U.S.C. 811(h)(1), as determined after consideration of the substance's history and current pattern of abuse, the scope, duration and significance of abuse, the risk to the public health, the diversion from legitimate channels, and clandestine importation, manufacture, or distribution, CSA § 201(c)(4)-(6), (h)(3), 21 U.S.C. 811(c)(4)-(6), 811(h)(3). Second, to qualify for listing on schedule I, a substance must have "a high potential for abuse," it must have "no currently accepted medical use in treatment in the United States," and there must be "a lack of accepted safety for use of the drug or other substance under medical supervision." CSA § 202(b)(1), 21 U.S.C. 812(b)(1).[15] There is no question in this case that these standards meet the "intelligible principle" test for upholding Congress's delegation of authority.

2. While petitioners state that they do "not challenge the specificity of the substantive standards that Congress established to govern the exercise of [the Section 201(h)] delegated powers," Pet. Br. 13, 21, they nevertheless claim that the Attorney General may act with "unfet-

[15] A proposed, but not enacted, version of Section 201(h) would have authorized the Attorney General to list a substance on any schedule for which it qualified, but would have given the Secretary of HHS authority to veto the expedited scheduling. See S. 1762, 98th Cong., 1st Sess. (1983), as reported in S. Rep. No. 225, *supra*, at 616-617. The enacted version, however, authorized the Attorney General to list temporarily only schedule I substances and eliminated the Secretary's veto power. The House Committee on the Judiciary explained:

> In examining the particular substances for which the scheduling action was most necessary, the Subcommittee concluded that limiting the authority only to substances that have no currently accepted medical use in treatment addressed both the legitimate concerns of those in the health care industry and the principal danger to the public health.

H.R. Rep. No. 835, 98th Cong., 2d Sess. 10 (1984). In short, the health care industry's concerns were accommodated, and the need for the Secretary's veto power were eliminated, by limiting the temporary scheduling authority to schedule I substances. See note 4, *supra*.

tered discretion" in selecting "any drug" for emergency schedule I listing under Section 201(h), Pet. Br. 14, 24. Petitioners overlook the significance of the requirements that a substance listed on an emergency basis must both pose an "imminent hazard" and meet the three criteria for schedule I listing set in out Section 202(b)(1). See Pet. Br. 14 n.9. For example, one of the key distinctions drawn by Section 202(b) between schedule I substances and substances qualifying for inclusion on the other schedules is the lack of a "currently accepted medical use in treatment in the United States." 21 U.S.C. 812(b)(1)(B). Each of the other schedules includes substances that have a currently accepted medical use. See 21 U.S.C. 812(b)(2)(B), (3)(B), (4)(B), and (5)(B). Thus, petitioners' suggestion (Br. 24) that the Attorney General "could add a substance as innocuous as aspirin to Schedule I" is not only farfetched, but is precluded by the statute.[16]

3. Petitioners also suggest (Br. 15-16, 30-31) that when Congress delegates authority to the Executive Branch to identify specific conduct that may result in criminal prosecution there is a need for "heightened constitutional concerns." This Court, however, has never rejected application of the "intelligible principle" test in the criminal context. The relevant inquiry remains whether Congress has set forth standards sufficiently

[16] Other passages of petitioners' brief seem to suggest that Section 201(h) was intended to regulate only fundamentally new drugs. See Br. 6 n.3, 14 n.9. Congress recognized, however, that a drug (such as naturally occurring peyote) may exist long before there emerges a need—resulting from the drug's abuse—to control its distribution. Hence, there is no requirement that the drug be "newly designed or created" (Pet. Br. 6 n.3). Instead, to qualify for temporary listing under Section 201(h), the substance must not already be listed on any of the schedules, the substance must not be subject to an exemption or approval under the FDA's new-drug provisions of 21 U.S.C. 355, and the temporary listing of the substance must be "necessary to avoid an imminent hazard to the public safety." CSA § 201(h)(1), 21 U.S.C. 811(h)(1).

specific to guide the executive official's exercise of discretion. Cf. *Skinner*, 490 U.S. at 222-223 (rejecting the "application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power").[17]

For example, in *Yakus* v. *United States*, 321 U.S. 414 (1944), this Court upheld a delegation of authority to fix maximum commodity prices and rents even though violation of the regulations was a criminal offense. There was no suggestion in that case that a more stringent standard of delegation applied. Similarly, in *J.W. Hampton, Jr., & Co.*, 276 U.S. at 406, the Court observed that Congress frequently secures the "the exact effect" of legislation by vesting discretion in executive officers to make regulations "directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations." 276 U.S. at 406. Indeed, the instances are legion where Congress has authorized Executive Branch agencies to prescribe regulations or to make administrative determinations that may result in the imposition of criminal punishment.[18] This Court has repeatedly upheld such au-

[17] Petitioners rely on statements in *Mistretta* and *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947), that characterize the statute at issue in *Schechter Poultry* and *Panama Refining* as delegating power to make "federal crimes of acts that never had been such before" and to create "new crimes in uncharted fields." *Fahey*, 332 U.S. at 249, 250; see *Mistretta*, 488 U.S. at 373 n.7. The point of those statements was not that a different constitutional standard applies to regulations with penal consequences, but rather that the delegations at issue in *Schechter Poultry* and *Panama Refining* were unconstitutional because "Congress had failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 n.7 (emphasis added).

[18] See, *e.g.*, 7 U.S.C. 87b(a)(11), 87c (Department of Agriculture grain regulations); 7 U.S.C. 2024(b) (Department of Agriculture food stamp regulations); 15 U.S.C. 78ff (violation of Securities and Exchange Commission regulations); 15 U.S.C. 2070 (violation of Consumer Product Safety Commission regulations); 15 U.S.C. 2615(b) (violation of Environmental Protection Agency

thorizations without regard to their penal consequences. See, *e.g.*, *Avent* v. *United States*, 266 U.S. 127 (1924); *McKinley* v. *United States*, 249 U.S. 397 (1919); *United States* v. *Grimaud*, 220 U.S. 506 (1911); *Monongahela Bridge Co.* v. *United States*, 216 U.S. 177 (1910); *Union Bridge Co.* v. *United States*, 204 U.S. 364 (1907); *In re Kollock*, 165 U.S. 526 (1897).[19]

4. Congress's prescription of "intelligible principles" is sufficient, by itself, to assure that Section 201(h) does not delegate "legislative power"—in the sense the Constitution uses that term—to the Executive Branch. See *Skinner*, 490 U.S. at 218-219. Indeed, prior to the devel-

toxic substance control regulations); 15 U.S.C. 3414(c)(2) (violation of Federal Energy Regulatory Commission natural gas regulations); 16 U.S.C. 773g (violation of International Pacific Halibut Commission regulations); 19 U.S.C. 1436(c), 1459(g) (violation of Presidential regulations pertaining to international investment); 29 U.S.C. 666(e) (violation of Occupational Safety and Health Administration regulations); 30 U.S.C. 1268 (violation of Department of Interior orders); 31 U.S.C. 5322 (violation of Department of Treasury regulations respecting monetary instruments transactions); 33 U.S.C. 1319, 1415 (violation of EPA water quality regulations); 42 U.S.C. 4910(a) (violation of EPA noise control regulations); 42 U.S.C. 6928(d) (violation of EPA solid waste management regulations); 42 U.S.C. 6992d (violation of EPA medical waste regulations); 42 U.S.C. 8432 (violation of Department of Energy regulations); 42 U.S.C. 9603 (violation of EPA hazardous substance reporting requirements); 43 U.S.C. 1350 (violation of Department of Interior regulations respecting outer continental shelf leasing); 46 U.S.C. 3718(b) (violation of Department of the Treasury regulations respecting inspection of vessels); 49 U.S.C. 521(b)(6), 11903 (violation of Interstate Commerce Commission requirements).

[19] Even if delegations involving the creation of novel criminal liability warranted closer scrutiny, that scrutiny would not be necessary in this case. As the court of appeals observed, the Attorney General has had authority since 1970 to identify substances for permanent placement on schedule I, and the courts have repeatedly upheld that authority. J.A. 37. Congress, not the Attorney General, has prescribed the elements of the criminal offenses involving such substances and has defined the penalties. Thus, the scope of the Attorney General's delegated authority is quite narrow.

opment of that test, this Court repeatedly stated that statutes conditioning the application of the law on executive determinations do not delegate lawmaking authority at all; rather, they confer "an authority or discretion as to its execution, to be exercised under and in pursuance of the law." *J.W. Hampton, Jr., & Co.*, 276 U.S. at 407, and *Field* v. *Clark*, 143 U.S. 649, 693-694 (1892), quoting *Cincinnati, W. & Z. R.R.* v. *Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852).[20]

[20] For example, in *United States* v. *Grimaud, supra*, the Court observed that the Secretary of Agriculture "did not legislate" when he promulgated criminally enforceable grazing regulations pursuant to the laws establishing national forests because he "did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done." 220 U.S. at 518. Rather, the Secretary was fulfilling the executive function "to administer the law and carry the statute into effect." *Ibid.*

Similarly, in *Monongahela Bridge Co.* v. *United States, supra*, the Court rejected an unlawful delegation claim in a criminal prosecution based on the Secretary of War's administrative determination that a bridge constituted an obstruction to navigation under Section 18 of the Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1151. 216 U.S. at 192. Justice Harlan stated for the Court that the Secretary "could not be said to exercise strictly legislative or judicial power" where he simply determines, pursuant to congressional directive, "some facts or some state of things upon which the enforcement of [a statute] may depend." *Id.* at 193.

The Court reached the same result under similar facts in *Union Bridge Co.* v. *United States*, 204 U.S. at 386 ("In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."). See also, *e.g.*, *Field* v. *Clark*, 143 U.S. at 694 ("The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."); *In re Kollock*, 165 U.S. at 533 ("The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense."); *Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382, 388 (1813) ("we can see no sufficient reason, why the legislature should not exercise its discretion * * * either expressly or conditionally, as their judgment should direct").

The Court's "intelligible principle" standard has further refined that reasoning by recognizing that if Congress has failed to articulate intelligible principles to guide the executive officer's exercise of discretion under the statute, there may be a de facto delegation of legislative power. See *Mistretta*, 488 U.S. at 418-419 (Scalia, J., dissenting). Once it is determined, however, that the executive officer is executing Congress's will pursuant to ascertainable legislative guidelines, that is the end of the delegation inquiry. In cases such as this one, where Congress has set forth specific standards to direct the Attorney General's exercise of discretion, there is no delegation of legislative power at all. See *Mistretta*, 488 U.S. at 379.

B. The Constitution Does Not Prohibit Congress From Authorizing The Attorney General To Exercise The Authority Conferred By Section 201(h)

Petitioners argue that satisfaction of this Court's "intelligible principle" standard is not enough in this case. They contend (Br. 14-23) that Section 201(h) violates delegation principles by committing the temporary scheduling decision to the Attorney General rather than to some other executive official, such as the Secretary of HHS. Petitioners assert (Br. 14) that Congress's choice results in an "unconstitutional aggregation of power" because it gives the Attorney General "unilateral authority to create crimes and prosecute violators." This novel argument misconceives both the nature of the Constitution's separation of powers principle and the specific responsibilities of the Attorney General.

1. This Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta*, 488 U.S. at 380. But the concept of separation of powers always focuses on the distribution of powers among the "three coequal Branches." *Ibid.* What is for-

bidden are "provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." *Id.* at 382.

This Court has never suggested that separation of powers principles govern the aggregation of powers within subdivisions of the Executive Branch. Indeed, the Constitution provides no premise for such an approach because it vests all executive power in the President, U.S. Const. Art. II, § 1, and requires him to see that the laws are "faithfully executed," U.S. Const. Art. II, § 3. From a constitutional perspective, the Executive Branch's authority to administer statutes through the promulgation of regulations is necessarily and always aggregated with the Executive Branch's authority to enforce the law through penal and other legislatively prescribed means. The promulgation of regulations and the prosecution of offenses are simply different aspects of the Executive's function.

2. Petitioners recognize that there is nothing novel in Congress authorizing Executive Branch officials to proscribe dangerous substances upon determination that the substances pose an "imminent hazard to the public safety" and to enforce those proscriptions through criminal penalties. CSA § 201(h), 21 U.S.C. 811(h).[21] They concede that "the need for flexibility and expertise may well justify delegation of the temporary scheduling power to some

[21] Compare, *e.g.*, 15 U.S.C. 2605(d) (authorizing the Administrator of the Environmental Protection Agency to impose immediate restrictions on the manufacture of toxic substances that pose an unreasonable risk of serious or widespread injury); 21 U.S.C. 355(e) (authorizing the Secretary of Health and Human Services to suspend approval of new drugs upon finding an imminent hazard to public health health); 29 U.S.C. 655(c) (authorizing the Secretary of Labor to promulgate emergency temporary occupational safety standards); 30 U.S.C. 811(b) (authorizing the Secretary of Labor to promulgate emergency temporary mine safety standards). See also note 18, *supra*.

executive officer." Br. 22. Petitioners argue (Br. 15, 22-23), however, that Congress should have vested the Secretary of HHS, rather the Attorney General, with the authority to make the temporary listing decision to avoid aggregating "criminal lawmaking and prosecutorial power." That argument, however, does really not rest on the constitutional doctrine of separation of powers, but simply challenges the wisdom of a legislative policy judgment.[22]

Petitioners err at the outset by simply *assuming* that Congress has delegated "criminal lawmaking" power to the Attorney General—even though, as they concede, Congress has provided an "intelligible principle" to control the executive's exercise of discretion. As we have explained (pp. 19-25, *supra*), Congress's articulation of clear standards to guide executive discretion ensures that the Attorney General performs only executive functions. That should end the delegation inquiry. The extent to which a particular function is executive in nature does not depend on which Executive Branch official performs the function. Indeed, petitioners are unable to cite a single instance in which this Court has invalidated any Act of Congress on the ground that it gave one Executive Branch official, rather than another, authority over a particular executive function.

[22] The Constitution does not create a Department of Justice and a separate Department of Health and Human Services. Under the constitutional scheme, Congress could create a Department of Justice, Health, and Human Services, headed by a single official. Or, it could make all of the Executive Branch departments subunits within a single entity headed by one officer of the United States acting under the direction of the President. Nothing in the Constitution would prohibit such a scheme, as long as the President remained supreme over the Executive Branch. Because the functions of different departments could be performed by a single department without violating separation of powers principles, it makes no sense to say that separation of powers principles are offended if the executive functions of scheduling and enforcement are performed within a single department, rather than separate departments within the Executive Branch.

Congress has broad authority, under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, to create or select the appropriate Executive Brance officer to perform a particular executive function. Congress vested the Attorney General with authority to make temporary scheduling decisions because, in Congress's judgment, the Attorney General is best situated to determine whether a substance poses an "imminent hazard to the public safety." Specifically, Congress enacted the temporary listing provisions to deal with the emergent *abuse* of unlisted drugs. CSA § 201(h)(3), 21 U.S.C. 811(h)(3) (requiring that the imminent hazard determination be based on considerations related to abuse and risk to the public health). As a general matter, the Controlled Substances Act vests the Attorney General with primary responsibility for determining abuse characteristics. See CSA § 201(b), 21 U.S.C. 811(b) (restricting the Secretary of HHS to consideration of the "scientific or medical" aspects of abuse characteristics). Thus, it is quite reasonable that Congress would vest the Attorney General, rather than the Secretary of HHS, with the imminent hazard determination.

Congress's decision that the Attorney General, rather than the Secretary of HHS, should make the imminent hazard determination is also consistent with the "real world" aspects of the problem. As in the case of Euphoria, the government typically learns that a drug poses an imminent hazard through criminal investigations by the DEA or state law enforcement authorities that reveal emerging abuse patterns. See 52 Fed. Reg. 30,174 (1987); App., *infra*, 7a, 9a, 12a. Thus, the Attorney General, who supervises the DEA and coordinates law enforcement activities with the States, is best situated to respond promptly to the imminent public safety menace posed by drugs such as Euphoria, which are produced and sold through clandestine operations.

3. Petitioners argue, nevertheless, that the Attorney General's regulatory and prosecutive functions must be

separated to prevent "'tyrannical' abuse." Br. 15-19. They suggest that the Attorney General might use his Section 201(h) authority to provide a means for prosecuting "targeted" individuals. Br. 18-19. That argument, however, does not rest on the constitutional concept of separation of powers, but rather on the notion that particular officials with the Executive Branch cannot be trusted to execute faithfully Congress's directives. See Pet. Br. 18.

As petitioners recognize (Br. 17 n.12), the Constitution, through the Due Process Clause and the specific guarantees in the Fifth and Sixth Amendments, provides significant safeguards against abuses of the power of prosecution. In addition, Congress can provide further safeguards through statutes and rules of procedure. There is no need for the Court to create additional checks that have no source in the Constitution's text, based on speculative assumptions that public officials will misuse lawful authority. To the contrary, as this Court has explained, Executive Branch officials are entitled to the presumption that "they will act properly and according to law." *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965). See, *e.g.*, *Fahey* v. *Mallonee*, 332 U.S. 245, 256 (1947).

Moreover, there is little realistic possibility of abuse of the sort that petitioners posit in this case. Petitioners' hypothetical scenario of abuse rests on the assumption that a single individual exercises the rulemaking and prosecutive functions. In reality, those functions are carried out by separate officials: the Administrator of the DEA exercises the authority to schedule substances under Section 201(h) (see p. 39, *infra*), while the individual United States Attorneys both possess and typically exercise the statutory authority to initiate prosecutions. See 28 U.S.C. 547. Thus, there is in practice a separation of the rulemaking and prosecutive functions within the Department of Justice respecting controlled substances. The potential abuse that petitioners posit is no more likely to occur in this case than in any case where

the violation of an administrative regulation may provide the basis for a criminal prosecution.[23]

In any event, petitioners fail to identify any such abuse in this case. They concede that Euphoria meets the legislative standards for designation as a schedule I controlled substance, and they do not contend that the listing of Euphoria was designed to "target[]" them for prosecution. Indeed, the fact that the government lists a controlled substance through a prospective rule of general application all but eliminates any possibility of petitioners' hypothesized abuse. Moreover, as we explain in greater detail below, the government's actions are subject to judicial review at the conclusion of the permanent listing and in the course of an enforcement proceeding. That review is a sufficient safeguard "against statutory or constitutional excesses." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 106 (1946).[24]

4. Petitioners contend that Congress's action in this case is "entirely unprecedented in our history" and that "[n]o case supports" upholding the authority of the Attorney General both to regulate legislatively identified activity and to prosecute violation of those regulations as a crime. Br. 19, 20. Those assertions are not accurate.

[23] While the Attorney General supervises both the U.S. Attorneys and the DEA Administrator, it likewise can be said that the President supervises every agency that promulgates criminally enforceable regulations and also supervises the criminal enforcement of those regulations. Thus, the potential for abuse that petitioners posit theoretically exists in every case where a regulation may serve as the predicate for a criminal offense.

[24] Petitioners concede (Br. 15), that Congress can combine regulatory and civil enforcement functions in a single agency. See, *e.g.*, *American Power & Light Co.* v. *SEC*, 329 U.S. at 104-106; *National Broadcasting Co.* v. *United States*, 319 U.S. at 225-226. The principle that sustains that result is equally applicable here: the executive official acts pursuant to legislative direction, and his exercise of discretion is subject to judicial oversight at the conclusion of the rulemaking (see *National Broadcasting Co.*, 319 U.S. at 193) or in subsequent enforcement proceedings (see *American Power & Light Co.*, 329 U.S. at 96, 105-106).

Congress has granted and the courts have uniformly upheld the Attorney General's authority to list drugs permanently as controlled substances.[25] In addition, Congress long has authorized the Attorney General to identify prohibited prison contraband and prosecute persons who introduce it into prison. 18 U.S.C. 1791, 4001. Prior to 1984, Section 1791 provided that:

> Whoever, contrary to any rule or regulation promulgated by the Attorney General, introduces or attempts to introduce into or upon the grounds of any Federal penal or correctional institution or takes or attempts to take or send therefrom any thing whatsoever, shall be imprisoned not more than ten years.

18 U.S.C. 1791 (1982). The courts uniformly upheld the constitutionality of that statute, which in petitioners' terminology combined "crime-defining and crime-prosecuting authority" (Br. 19). See S. Rep. No. 225, *supra*, at 380 n.1.[26] Congress amended that statute in 1984 to ensure that the statute would reach possession as well as introduction of contraband. See *id.* at 380. Congress's delegation to the Attorney General under the past and

[25] See, *e.g.*, *United States* v. *Alexander*, 673 F.2d 287 (9th Cir.), cert. denied, 459 U.S. 876 (1982); *United States* v. *Barron*, 594 F.2d 1345 (10th Cir.), cert. denied, 441 U.S. 951 (1979); *United States* v. *Gordon*, 580 F.2d 827 (5th Cir.), cert. denied, 439 U.S. 1051 (1978); *United States* v. *Roya*, 574 F.2d 386 (7th Cir.), cert. denied, 439 U.S. 857 (1978); *United States* v. *Pastor*, 557 F.2d 930 (2d Cir. 1977). The statutory criteria governing a Section 201(h) temporary scheduling are as specific as—and the penalties for violations are no more stringent than—those governing permanent scheduling.

[26] See, *e.g.*, *United States* v. *Koopmans*, 757 F.2d 901 (7th Cir. 1985); *United States* v. *Chatman*, 538 F.2d 567 (4th Cir. 1976); *United States* v. *Park*, 521 F.2d 1381 (9th Cir. 1975); *United States* v. *Berrigan*, 482 F.2d 171 (3d Cir. 1973); *Carter* v. *United States*, 333 F.2d 354 (10th Cir. 1964).

present versions of 18 U.S.C. 1791 is at least as broad as that under Section 201(h).[27]

C. Congress Has Provided Constitutionally Adequate Judicial Oversight Of Section 201(h) Scheduling Decisions

Petitioners also contend that Section 201(h) is an unlawful delegation because Congress has failed to set out adequate provisions for judicial review of temporary scheduling decisions. Petitioners' argument, however, rests in large part on a misunderstanding of Section 201(h).

1. As petitioners recognize, the Controlled Substances Act provides for judicial review of permanent scheduling decisions following the issuance of a final rule. CSA § 507, 21 U.S.C. 877.[28] Thus, the Attorney General's decision to list a substance on schedule I is subject to judicial review under Section 507 if the substance is permanently listed—a process that must be completed within 18 months of the temporary listing. See CSA § 201(h)(2).

Petitioners object that Congress, through Section 201(h)(6), has precluded Section 507 judicial review during the period of up to 18 months that the temporary

[27] As another example, Congress has granted the Attorney General rulemaking authority respecting aliens and nationality, 8 U.S.C. 1103(a), and violation of such regulations may be the predicate for criminal enforcement, see 8 U.S.C. 1324(a).

[28] Section 507 of the Controlled Substances Act specifically states that "any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located." 21 U.S.C. 877. That provision grants a person the right to seek review of a final determination to list a substance permanently on one of the controlled substances schedules. See, *e.g.*, *Grinspoon* v. *DEA*, 828 F.2d 881 (1st Cir. 1987); *Reckitt & Colman, Ltd.* v. *DEA*, 788 F.2d 22 (D.C. Cir. 1986).

listing is in effect. See 21 U.S.C. 811(h)(6). Section 201(h)(6), however, is simply designed to postpone suits challenging the listing decision until the administrative process has run its course. A temporary listing of a substance under Section 201(h) is the first step in the process of determining whether the substance should be permanently listed on a controlled substances schedule. The Attorney General's basis for listing the substance temporarily is open to public comment and reconsideration in the course of the Section 201(a) rulemaking for permanent listing. During that rulemaking, the Attorney General may decide that the substance should be listed on a different schedule or not listed at all. Hence, judicial review of the temporary listing decision prior to completion of the rulemaking would be premature and might prove entirely unnecessary.[29]

2. Petitioners nevertheless contend that Section 201(h) is an unconstitutional delegation of authority because Section 201(h)(6) denies them an opportunity, pending the permanent listing decision, to have a court

[29] Cf. *McGee* v. *United States*, 402 U.S. 479, 483 (1971) (noting that recourse to the administrative process may cure or render moot the defects later complained of in court). The House Committee on the Judiciary explained that the limitation on judicial review in Section 201(h)(6) "conforms to the general practice for temporary, emergency orders such as this procedure." H.R. Rep. No. 835, *supra*, at 13. For example, the Toxic Substances Control Act provides that a rule respecting toxic substances may be made immediately effective for the interim period between its proposal in the *Federal Register* and final action on the proposal if activities respecting the substance are "likely to result in an unreasonable risk of serious or widespread injury to health or the environment" and immediate effectiveness of the rule "is necessary to protect the public interest." 15 U.S.C. 2605(d)(2)(A). Such emergency rules "shall not, for purposes of judicial review, be considered final agency action." *Ibid.* Similarly, the FDA may issue an immediate ban on a dangerous medical device if the device "presents an unreasonable, direct, and substantial danger to the health of individuals," 21 U.S.C. 360f(b), and such a temporary regulation is not subject to judicial review until it has been finalized after completed rulemaking proceedings, 21 U.S.C. 360g(a)(5).

"'ascertain whether the will of Congress has been obeyed.'" Br. 24, quoting *Skinner*, 490 U.S. at 218. It is far from clear that this challenge, even if sustained, would warrant reversal of their convictions.[30] In any event, however, Section 201(h)(6) does not foreclose judicial oversight of the Attorney General's action during that period. As the court of appeals properly recognized, an individual who is prosecuted for a drug violation based on a temporarily listed substance may challenge the legality of the temporary listing as a defense to the prosecution. J.A. 33 n.2, 42-43.

Under the principle of sovereign immunity, an individual has no general right to bring a lawsuit against the government challenging sovereign action. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).[31] Nevertheless, Congress frequently authorizes individuals to bring suits against the government (or its officers)—as in Section 507 of the Controlled Substances Act—to review such action at an appropriate time. See also, *e.g.*, Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (permitting review of final agency action). The presence or absence of a provision creating a right to seek judicial review of agency action, however, generally does not prevent an individual from

[30] Petitioners did not seek review of the Attorney General's scheduling decision either during or after completion of the permanent rulemaking, nor do they argue that Euphoria was improperly listed as a Schedule I substance. See J.A. 33. Thus, Section 201(h)(6)'s preclusion of judicial review did not affect them in any way. For that reason it is questionable whether petitioners have standing to challenge the constitutionality of that provision. Even if they have standing, petitioners would be entitled to reversal of their convictions based on their challenge to the effect of Section 201(h)(6) only if that paragraph were deemed non-severable from the remainder of the subsection. See 28 U.S.C. 2111.

[31] See generally Cramton, *Nonstatutory Review of Federal Administrative Action: The Need For Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, And Parties Defendant*, 68 Mich. L. Rev. 387 (1970) (describing the evolution of sovereign immunity and its exceptions).

challenging agency regulations or administrative determinations as a defense to a criminal action brought to enforce them.[32]

While Section 201(h)(6) postpones an individual's right to seek judicial review of a listing decision under Section 507, it does not affect the individual's right to challenge the listing as a defense to a criminal enforcement action brought during the period that the drug was temporarily listed as a schedule I substance. As petitioners acknowledge (Br. 27), there is a strong presumption favoring judicial oversight of agency action.[33] When Congress wishes to prevent judicial inquiry into agency action in an enforcement proceeding, it typically makes that wish explicit.[34] There is no clear indication in the

[32] See, *e.g.*, *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337 (1952) (criminal enforcement of an ICC regulation); *Estep* v. *United States*, 327 U.S. 114 (1946) (criminal enforcement of Selective Service designation); *Monongahela Bridge Co.* v. *United States*, *supra* (criminal enforcement of the Secretary of War's determination that a bridge obstructed navigation); *Union Bridge Co.* v. *United States*, *supra* (same). The APA also incorporates that general rule, providing that "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement," 5 U.S.C. 703. That provision simply "restates existing law." U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 99 (1947). See also *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 115 (1941).

[33] See *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332, slip. op. 16 (Feb. 20, 1991) (it "is presumable that Congress legislates with knowledge of * * * our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action"). See also, *e.g.*, *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975); *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974).

[34] See, *e.g.*, Clean Air Act, § 307(b)(2), 42 U.S.C. 7607(b)(2) (providing that EPA action that is reviewable under Section 307(b)(1) "shall not be subject to judicial review in civil or criminal proceedings for enforcement").

Controlled Substances Act or its legislative history that Congress intended to withdraw that right here. Rather, it is clear from the structure of the statute that Section 201(h)(6)'s limitation on "judicial review," 21 U.S.C. 811(h)(6), pertains only to the remedy that Congress provided in Section 507, allowing aggrieved parties to seek "judicial review." 21 U.S.C. 877. No court has held, as petitioners would have it, that Section 201(h)(6) precludes an individual from challenging a temporary scheduling decision as a defense to a prosecution. Petitioners' argument accordingly is without merit.[35]

3. Petitioners contend (Br. 28-30) that even if judicial review of a Section 201(h) scheduling order is available in an enforcement proceeding, the statutory scheme is unconstitutional because it does not provide for a pre-enforcement challenge to the validity of the administrative determination. It is well settled, however, that the Constitution does not require "that there be judicial inquiry before discretion can be exercised." *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-599

[35] In other contexts, this Court has been unwilling to deny judicial inquiry into the legality of an administrative regulation in a criminal enforcement proceeding where Congress has not unambiguously precluded such inquiry. For example, in *Estep* v. *United States*, 327 U.S. 114 (1946), this Court held that a draftee who faced criminal prosecution for refusing to submit to military induction could raise the defense that the draft board's actions were lawless and outside its jurisdiction, despite a statutory provision rendering the decisions of the local draft boards "final" except for available administrative review. The Court stated that courts presumptively have the power to review administrative action when exercising "the general jurisdiction which Congress has conferred upon them." *Id.* at 119-120. Although noting that "except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses," *ibid.*, the Court stated that it would not "readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency," *id.* at 122. See also *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978) (interpreting Clean Air Act § 307(b)(2)).

(1950).[36] Congress can and frequently does deny pre-enforcement review of regulatory actions.[37]

Petitioners cite no case holding that pre-enforcement review of administrative determinations is constitutionally required. As petitioners recognize (Br. 33), this Court has upheld Congress's power to restrict pre-enforcement review, even where important liberty interests are at stake. For example, in *Clark* v. *Gabriel*, 393 U.S. 256 (1968), this Court held that pre-enforcement review of a military induction determination was not constitutionally required even though the induction determination would directly affect an individual's liberty and disobedience would result in criminal prosecution. The Court observed that pre-induction review would result in "litigious interruptions" of induction procedures and concluded:

> We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an

[36] In *Ewing*, the Court rejected a manufacturer's claim that he was entitled under the Due Process Clause to pre-enforcement review of a determination that vitamin products were misbranded and subject to seizure, observing that "it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts." 339 U.S. at 599. The Court observed that if the administrative determination were subject to pre-enforcement review, the "means which Congress provided to protect consumers against the injurious consequences of protracted proceedings would then be seriously impaired." *Id.* at 601.

[37] See, *e.g.*, *Witmer* v. *United States*, 348 U.S. 375, 377 (1955) (noting that there "is no direct judicial review" of a military induction determination). See also, *e.g.*, APA, 5 U.S.C. 701(a)(1) (recognizing that statutes may preclude judicial review entirely); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9613(h) (precluding pre-enforcement review of government hazardous substance clean-up remedies); note 29, *supra*.

> available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction.

393 U.S. at 258-259.

Petitioners attempt to distinguish *Clark* on the grounds that (1) that case involved "military necessity"; (2) the agencies involved were required to make a large number of individual determinations; and (3) habeas corpus relief was available. Br. 33. None of those distinctions is persuasive. First, the government's interest in protecting the public from the imminent danger of hazardous drugs, such as Euphoria, poses a "necessity" different in kind but no less pressing in degree than military conscription. See *Ewing*, 339 U.S. at 599-600. Second, Congress's judgment that pre-enforcement review would thwart the regulatory process is equally valid here, where there is a need for immediate regulation of dangerous substances pending permanent rulemaking. *Id.* at 601. Third, there is no need for habeas corpus relief in the present case because the Attorney General's regulatory action—which prohibits the sale of an imminently hazardous substance for a maximum of 18 months, pending completion of formal rulemaking—does not directly result in a deprivation of liberty.

Petitioners fail to identify any substantial liberty interest that would be served by pre-enforcement review. Petitioners principally contend that pre-enforcement review is necessary to save individuals from the "fear and anxiety" (Br. 28-30) of a criminal prosecution. As petitioners acknowledge (Br. 34), however, pre-enforcement review would do little to allay the apprehension of criminal prosecution, because the provision of review, by itself, would not stay the effectiveness of a scheduling order. Rather, individuals in petitioners' business can avoid that "fear and anxiety" of criminal prosecution by curtailing their distribution of substances that the

government has determined to be hazardous during the period of temporary regulation, presenting their challenges to the government's determination in the rulemaking proceedings, and then (if necessary) seeking judicial review of the permanent listing. Thus, the individuals affected by the Attorney General's temporary scheduling decisions have an adequate judicial remedy—one that was not available to the defendants in *Clark*—for obtaining review of the administrative decision.[38]

II. THE ATTORNEY GENERAL LAWFULLY SUBDELEGATED HIS SECTION 201(h) AUTHORITY TO THE ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION

Petitioners also contend (Br. 35-38) that their convictions should be reversed because the Attorney General unlawfully delegated his authority to schedule controlled substances under Section 201(h) to the Administrator of the DEA. See 28 C.F.R. 0.100(b).[39] Petitioners do not argue that there is any constitutional impediment to that subdelegation, nor do they argue that

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[38] As the record in this case indicates, parties who distribute drugs illicitly are not likely in any event to avail themselves of pre-enforcement judicial review. Petitioners have not questioned the merits of the government's decision to schedule Euphoria. They did not submit comments in the Section 201(a) or the Section 201(h) rulemakings respecting the drug, and they have never pretended to be legitimate drug manufacturers or distributors.

[39] The Attorney General's subdelegation regulation provides that "[t]he following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Administrator of the Drug Enforcement Administration":

> (b) Functions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended. This will include functions which may be vested in the Attorney General in subsequent amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970, and not otherwise specifically assigned or reserved by him.

28 C.F.R. 0.100(b).

the delegation regulation itself is deficient in any respect. Petitioners contend only that Congress has not empowered the Attorney General to subdelegate his authority under Section 201(h). In fact, Congress has clearly authorized that subdelegation of authority.

1. Two relevant statutory provisions authorize the Attorney General to delegate his powers under Section 201(h) to the Administrator. First, Section 4(c) of the Act of September 6, 1966, which reorganized the Department of Justice, provides that the Attorney General "may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." 28 U.S.C. 510. Second, Section 501(a) of the Controlled Substances Act provides that the Attorney General "may delegate any of his functions under this subchapter to any officer or employee of the Department of Justice." 21 U.S.C. 871(a).[40] The Attorney General's delegation of authority to the Administrator contained in 28 C.F.R. 0.100(b) rests squarely on those statutory provisions. See 52 Fed. Reg. 24,447 (1987).

Petitioners speculate (Br. 35-38) that Congress intended that the Attorney General's temporary listing authority would be nondelegable. The clear, broad, and unqualified terms of both Section 4(c) and Section 510, however, unambiguously encompass the temporary listing authority set forth in Section 201(h). Additionally, Section 201(h) does not impose any limitations on the Attorney General's power to subdelegate the authority contained therein. Thus, the text of the relevant statutory provisions provides no basis for the exception petitioners suggest.

2. Petitioners' suggestion that the Court create an exception for Section 201(h) is also inconsistent with this Court's decisions interpreting other statutory delegation provisions. For example, in *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947), this Court upheld the authority of the Administrator of the Emergency Price Control Act to delegate to district directors his authority to issue subpoenas. That delegation rested on a general provision of the statute stating that the Administrator could appoint employees to carry out his functions and duties under the statute and that any duly authorized representative of the Administrator may exercise any and all of his powers. See *id.* at 120-122. The Court found no indication in the statute or in its legislative history that Congress intended to single out the subpoena authority as nondelegable. *Ibid.*[41]

Petitioners rely on *United States* v. *Giordano*, 416 U.S. 505 (1974), for a different result. That case, however, supports our position. In *Giordano*, Congress found from the language of the statute at issue, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, that Congress intended to preclude the Attorney General from relying on his general delegation authority under Section 4(c) to subdelegate his authority to apply for a wiretap order. Section 802 of Title III, 18 U.S.C. 2516 (1970), did not grant the Attorney General unfettered authority to apply for a wiretap order, but specifically stated that the authority rested in the "Attorney General, or any Assistant At-

[40] That subchapter includes Sections 101 through 709 of the Controlled Substances Act, 21 U.S.C. 801-904.

[41] The Court distinguished a previous decision, *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (1942), holding that the subpoena authority under the Fair Labor Standards Act of 1938, ch. 676, § 4(b), 52 Stat. 1061-1062, did not authorize the Administrator to delegate his power under that Act to sign and issue subpoenas. The Court observed that the legislative history of the Act revealed that a provision authorizing subdelegation of the subpoena authority had been eliminated from the bill in the conference committee. *Fleming*, 331 U.S. at 120. Moreover, the statute considered in *Cudahy* specifically identified the powers to gather data and to make investigations as delegable, and therefore by implication indicated that powers not specified were intended to be nondelegable. 331 U.S. at 121.

torney General specially designated by the Attorney General."

The Court accepted the proposition that the Attorney General's general delegation authority under Section 4(c) would permit the delegation of all functions previously or thereafter vested in the Attorney General unless a specific provision restricted that delegation authority. 416 U.S. at 512-514. The Court concluded, however, that Congress clearly expressed its intention to supersede the Attorney General's general delegation authority by specifically identifying in Section 802 who—in addition to the Attorney General—could authorize a wiretap application. The Court found that "[t]his interpretation of the statute is also strongly supported by its purpose and legislative history." *Ibid.*[42]

Petitioners do not point to anything in the Controlled Substances Act (or its legislative history) indicating that Congress intended to prohibit the Attorney General from subdelegating his temporary scheduling authority. Petitioners simply argue that the authority to list schedule I substances temporarily "is both so vast and so unbridled that congressional authority to subdelegate should be very clear before subdelegation is permitted." Br. 36. As we have discussed, above, the Section 201(h) scheduling authority is neither vast nor unbridled. In any event, both *Giordano* and *Fleming* indicate that Congress need not expressly authorize subdelegation when a general subdelegation provision exists. See *Giordano*, 416 U.S. at 513-514; *Fleming*, 331 U.S. at 121. Rather, a restriction on subdelegation must appear in the statute

[42] A previous version of the relevant provision that allowed delegation to an officer of the Department of Justice was changed to the enacted version in response to the specific concern that the authority to authorize wiretap applications should be limited. 416 U.S. at 516-517. The legislative history in other respects reflected Congress's understanding that the authority to authorize wiretap applications was to be limited to the persons identified in Section 802. See 416 U.S. at 518-522.

granting new authority.[43] There is no such restriction—and no basis for inferring one—in this instance. Accordingly, the Attorney General lawfully delegated his temporary listing authority (together with the permanent listing authority) to the Administrator.

[43] On other occasions, when Congress has sought to restrict the Attorney General's authority to subdelegate his powers, Congress has specifically limited the subdelegation authority. See, *e.g.*, 18 U.S.C. 245(a)(1) (certain prosecutions under the Civil Rights Act of 1968 are authorized only on the certification of "the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General * * * which function of certification may not be delegated"); 18 U.S.C. 1073 (prosecutions for flight to avoid prosecution or to avoid giving testimony may be initiated "only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated"); 18 U.S.C. App. at 711 (§ 14) (functions of the Attorney General under the Classified Information Procedures Act "may be exercised by the Deputy Attorney General, the Associate Attorney General, or by an Assistant Attorney General designated by the Attorney General for such purpose and may not be delegated to any other official"). With respect to other government agencies, Congress likewise has frequently, and explicitly, identified the authorities for which delegation is restricted. See, *e.g.*, 5 U.S.C. 3312(b), 3318(b)(4), 3504(b); 10 U.S.C. 809(c), 1370(a)(2), 1587(d), 1622(d), 1623(c), 2304(d)(2), 2356(a), 2435(c)(2); 12 U.S.C. 3502(c); 31 U.S.C. 1344(d)(3), 3553(e); 38 U.S.C. 5025(b)(3)(C); 40 U.S.C. 759(d)(1); 41 U.S.C. 10b-1(e), 253(d)(2), 421(d), 423(d)(7)(B); 42 U.S.C. 8374(e), 8511(f), 8513(g), 8521(c)(4); 49 U.S.C. 322(b).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1991

APPENDIX A

FOOD AND DRUGS—DRUG ABUSE PREVENTION TEMPORARY SCHEDULING TO AVOID IMMINENT HAZARDS TO PUBLIC SAFETY
§ 201(h), 21 U.S.C. 811(h)

(1) If the Attorney General finds that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to the requirements of subsection (b) of this section relating to the Secretary of Health and Human Services, schedule such substance in schedule I if the substance is not listed in any other schedule in section 812 of this title or if no exemption or approval is in effect for the substance under section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355]. Such an order may not be issued before the expiration of thirty days from—

(A) the date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, and

(B) the date the Attorney General has transmitted the notice required by paragraph (4).

(2) The scheduling of a substance under this subsection shall expire at the end of one year from the date of the issuance of the order scheduling such substance, except that the Attorney General may, during the pendency of proceedings under subsection (a)(1) of this section with respect to the substance, extend the temporary scheduling for up to six months.

(3) When issuing an order under paragraph (1), the Attorney General shall be required to consider, with respect to the finding of an imminent hazard to

the public safety, only those factors set forth in paragraphs (4), (5), and (6) of subsection (c) of this section, including actual abuse, diversion from legitimate channels. and clandestine importation, manufacture, or distribution.

(4) The Attorney General shall transmit notice of an order proposed to be issued under paragraph (1) to the Secretary of Health and Human Services. In issuing an order under paragraph (1), the Attorney General shall take into consideration any comments submitted by the Secretary in response to a notice transmitted pursuant to this paragraph.

(5) An order issued under paragraph (1) with respect to a substance shall be vacated upon the conclusion of a subsequent rulemaking proceeding initiated under subsection (a) of this section with respect to such substance.

(6) An order issued under paragraph (1) is not subject to judicial review.

DEPARTMENT OF JUSTICE DRUG ENFORCEMENT ADMINISTRATION: GENERAL FUNCTIONS
28 C.F.R. 0.100

The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Administrator of the Drug Enforcement Administration:

(a) Functions vested in the Attorney General by sections 1 and 2 of Reorganization Plan No. 1 of 1968.

(b) Functions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended. This will include functions which may be vested in the Attorney General in subsequent amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970, and not otherwise specifically assigned or reserved by him.

(c) Functions vested in the Attorney General by section 1 of Reorganization Plan No. 2 of 1973 and not otherwise specifically assigned.

APPENDIX B

Scheduling Recommendation for 4-methylaminorex

Prepared by

Drug Control Section
Office of Diversion Control
Drug Enforcement Administration

September 1988

Introduction

The Drug Enforcement Administration (DEA) has gathered information relevant to the abuse potential, trafficking and actual abuse of 4,5-dihydro-4-methyl-5-phenyl-2-oxazolamine (4-methylaminorex). 4-Methylaminorex is an analog of aminorex, an anorectic agent previously marketed in Europe. 4-Methylaminorex has appeared in the illicit drug traffic and pursuant to the emergency scheduling provision of the Controlled Substances Act (CSA) (21 U.S.C. 811(h)), was controlled by temporary placement into Schedule I, effective October 15, 1987 (52 FR 38225). The temporary scheduling of 4-methylaminorex expires one year from the effective date of control unless traditional scheduling procedures have been initiated in accordance with 21 U.S.C. 811(a).

Clandestine synthesis of 4-methylaminorex was first detected following seizure by Florida law enforcement officials of samples purported to be "speed." At least two deaths have been reported as a consequence of 4-methylaminorex abuse. Continued control of 4-methylaminorex is critical to law enforcement initiatives aimed at eliminating the manufacture and distribution of a potent amphetamine-like substance.

Criteria for inclusion of a substance in Schedule I

The necessary criteria for placing a substance in Schedule I, as set forth in 21 U.S.C. 812(b)(1) of the CSA, are as follows:

(1) *the drug or other substance has a high potential for abuse;*

(2) *the drug or other substance has no currently accepted medical use in treatment in the United States; and*

(3) *there is a lack of accepted safety for use of the drug or other substance under medical supervision.*

Potential for abuse

The term "potential for abuse" is described in House Report No. 91-1444 to include any or all of four elements. These elements and their applicability in determining the abuse potential of 4-methylaminorex as follows:

(A) *Evidence that individuals are taking the drug in amounts that create a hazard to their health or the safety of the community.*

One individual from Florida and another from Tennessee have died as a result of 4-methylaminorex abuse. Another individual using 4-methylaminorex was apprehended while running down the middle of a highway in Florida.

(B) *Diversion from legitimate channels.*

There is no known legitimate commercial manufacturer of 4-methylaminorex.

(C) *Self-administration of the drug without medical supervision.*

DEA laboratories have analyzed a number of exhibits and identified them as 4-methylaminorex. These exhibits, when summed, weighed over 1000 grams. A reasonable estimate of dosage unit weight for 4-methylaminorex is 20 mg. Therefore, seizures to date have amounted to over 50,000 dosage units.

(D) *Evidence that the drug in question is so related in its action to another drug or drugs that it is likely that it will have the same potential for abuse.*

The pharmacological profile of 4-methylaminorex closely resembles that of amphetamine. In McNeil

Laboratories Department of Pharmacology Report No. 49, 4-methylaminorex is described as "a potent central nervous system stimulant. The spectrum of pharmacological actions produced by McN-822 is similar in several respects to that produced by amphetamine." The report goes on to describe a number of autonomic and behavioral effects of 4-methylaminorex that support their conclusions regarding its stimulant effects. In particular it was noted that 4-methylaminorex (5mg/kg. i.v. in dog) produced substantial increases in mean blood pressure by way of sympathomimetic actions. Behavioral actions were also studied in dogs. Following doses of 1-2 mg-kg, 4-methylaminorex administration produced signs of restlessness, alertness, and dilated pupils and "a period of increased coordinated motor activity follows during which panting is clearly audible." When the dose was increased to 5 mg/kg, stereotyped behavior (repetitive motor movements) predominated, followed by seizures, loss of consciousness, respiratory depression and death. Amphetamine was reported to produce a similar pattern of behavioral changes in the dog.

In a study of the sympathomimetic actions of 4-methylaminorex, Yelnowsky and Katz [1] reported that cross tolerance of this compound with amphetamine was observed with respect to pressor actions. Furthermore they noted that, like amphetamine, 4-methylaminorex produces its sympathomimetic actions indirectly by way of released catecholamines.

Experimental studies of the anorectic actions of 4-methylaminorex have shown that it potently sup-

[1] Yelnowsky, J. and Katz, R. Sympathomimetic actions of cis-2-amino-4-methyl-5-phenyl-2-oxazoline, J. Pharmacol. Exp. Therap., 141: 180-184, 1963.

presses appetite in rats in a manner similar to amphetamine [2]. Authors Roszkowski and Kelley noted in their summary that "Of the 10 drugs tested 4 were very potent: d-amphetamine, methamphetamine, and two oxazolines, . . . McN-742 . . . and McN-822. . . ." Moreover, " . . . at effective dose levels, all of the anorexigens display a similar degree of central nervous system stimulation."

Review of the Eight Factors listed in 21 U.S.C. 811(c)

(1) Actual or relative potential for abuse.

As stated above, actual abuse has been made evident by the death of at least two individuals abusing 4-methylaminorex. In addition, a number of other individuals have been observed and/or apprehended by officials of the Florida Department of Law Enforcement following abuse of this substance. The serious nature of 4-methylaminorex abuse in Florida has led to the control of this substance within the state's Schedule I category. In a recently published article [4], a clandestine information sheet detailing the effects of 4-methylaminorex was quoted as saying "Potential for Abuse Of course! People have taken considerable overdoses. . . ."

[2] Poos, G.I., Carson, J.R., Rosenau, J.D., Roszkowski, A.P., Kelley, N.M. and McGowin, J., 2-amino-5-Aryl-2-oxazolines. Potent new anorectic agents. J. Med. Chem., 6: 266-272, 1963. Roszkowski, A.P. and Kelley, N.M., A rapid method for assessing drug inhibition of feeding behavior. J. Pharm. Exp. Therap., 140: 367-374, 1963.

[3] D. Inaba and L. Brewer. U4Euh. Microgram, 1987.

(2) Scientific evidence of its pharmacological effects, if known.

See section (D) under Potential for Abuse section.

(3) The state of current knowledge regarding the drug or other substance.

Toxicity

In addition to knowledge concerning the pharmacological actions, a study of toxicity was conducted by investigators at McNeil Pharmaceutical. Based on this data, 4-methylaminorex appears to produce toxic effects associated with the extension of its primary pharmacological action, namely central nervous system stimulation. With increasing dosage, 4-methylaminorex produces an over stimulation of the central nervous system that leads to stereotyped motor activity, seizure activity in the brain and associated convulsions, respiratory failure and death. Commentary from the McNeil Pharmaceutical researchers stresses that "This compound possesses a narrow margin of safety in the dog and should be tested very cautiously in humans."

It should be noted that two recent deaths have been attributed to the abuse of 4-methylaminorex[4]. Analyses from the Florida incident indicated the presence of high levels of 4-methylaminorex in the blood (21.3 mg/L) and urine (12.3 mg/L) of the victim.

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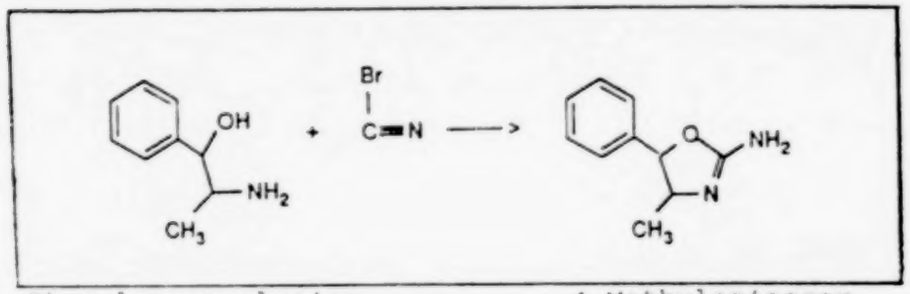
[4] Davis, F.T. and Brewster, M.E., A fatality involving U4Euh, a cyclic derivative of phenylpropanolamine. Case report from the Orlando Crime Laboratory, Orlando, Florida 1987. Personal communication from Ms. G. Armstrong, Naval Investigative Service, Memphis, Tennessee, 1988.

Chemistry

One of the most distressing properties of 4-methylaminorex from a drug control standpoint, is the nature of the chemical procedures involved in its synthesis. By combining phenylpropanolamine and cyanogen bromide in a sodium acetate buffered methanol solution, one obtains high yield synthesis of 4-methylaminorex in a single step (see Figure 1).



Phenylpropanolamine 4-Methylaminorex

Figure 1

In terms of chemical similarity to other psychoactive substances, 4-methylaminorex most closely resembles the anorectic agent, aminorex. Aminorex was marketed in Europe under the trade names **Menocil** and **Apiquel.** Another substance that is chemically similar to 4-methylaminorex is the Schedule IV central nervous system stimulant, pemoline **(Cylert).**

(4) Its history and current pattern of abuse.

Studies on 4-methylaminorex were reported in the scientific literature in the early 1960's and 1970's. Exhibits of clandestinely produced 4-methylaminorex have been obtained since 1986. The pattern of abuse of 4-methylaminorex appears similar to that of am-

phetamine. A clandestine information sheet[5] describes a large dose of 4-methylaminorex as producing "sleeplessness for three days and nights. . . . A few cases of abuse by taking doses for four to six days without sleeping have been reported."

(5) The scope, duration and significance of abuse.

The use of emergency controls on 4-methylaminorex may have played a role in limiting the spread of this substance. Our best estimate of the scope of 4-methylaminorex abuse is that most of the abuse has taken place in Florida, California and probably Pennsylvania with an isolated incident in Tennessee.

(6) What, if any, risk there is to the public health.

4-Methylaminorex produces pharmacological effects that are similar to those of amphetamine and related stimulants. Abuse of this substance should produce the same public health risks as those associated with the abuse of amphetamine, methamphetamine and other potent stimulants. The public health risks attendant to the abuse of stimulants are well established and need not be elaborated here.

(7) Its psychic or physiological dependence liability.

The pharmacological profile of 4-methylaminorex is substantially similar to amphetamine and methamphetamine. Such a profile strongly suggests that abuse of 4-methylaminorex will lead to the typical psychic dependence profile produced by the amphetamines.

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[5] D. Inaba and L. Brewer. U4Euh. Microgram, 1987.

(8) Whether the substance is an immediate precursor of a substance already controlled under this title.

4-Methylaminorex is not an immediate precursor of any controlled substance.

Summary

Review of the pharmacology of 4-methylaminorex indicates that this substance is a potent amphetamine-like stimulant with a low margin of safety. In the absence of any accepted medical use of the compound, regular control proceedings should be initiated to place 4-methylaminorex into Schedule I of Controlled Substances Act.

Law Enforcement Seizures of 4-Methylaminorex

Date	Location	Type of Action	Amount (grams)
01/06/89	Newark, N.J.	Lab Seizure	102.00
01/06/89	Newark, N.J.	Lab Seizure	0.44
01/06/89	Newark, N.J.	Lab Seizure	0.10
11/16/87	Gainesville, FL	Lab Seizure	14.00
11/16/87	Gainesville, FL	Lab Seizure	0.10
11/16/87	Gainesville, FL	Lab Seizure	28.20
05/01/87	Norristown, PA	Lab Seizure	1000.00
01/29/88	Oakland, CA	Lab Seizure	672.20
08/17/88	Montgomery Cty, IN	U/C Buy	13.00
*** Total ***			1830.04

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FOR ARGUMENT

No. 90-6282

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DANIEL TOUBY and LYRISSA TOUBY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

We argued in our opening brief that the temporary scheduling statute (21 U.S.C. § 811(h)) is constitutionally infirm because it aggregates non-reviewable criminal law powers in the Attorney General. Specifically, we claimed that (1) the unique combination of crime-defining and crime-enforcing powers in a single official and (2) the prohibition of judicial review of that official's crime-defining decisions are each impermissible and that, in any event, the existence of both in a single statute violates separation-of-powers requirements. We further argued that, given the remarkable nature of this aggregation of

power, the Attorney General was not permitted to subdelegate it without clear congressional authorization, which the statute does not contain.

The government's response does not come to grips with those arguments. In particular, the government totally ignores our claim that the aggregation of crime-defining and -enforcing powers *coupled with* the elimination of judicial review effects a unique and intolerable dismantling of traditional checks and balances on governmental power over personal liberty. Even when addressing each of our challenges separately, moreover, the government's brief largely misses the mark. Thus, it first argues at length that section 811(h) provides a sufficient "intelligible principle" within the meaning of this Court's delegation cases (Resp. Br. 19-25), even though we do not dispute that point. And the government responds to our judicial review claim by rewriting the statute twice—initially by mischaracterizing the temporary scheduling process as simply a preliminary step in the permanent scheduling process, and then by ignoring the plain meaning of the words "not subject to judicial review."

Most remarkably, the government is unable to cite any real precedent, either in case law or in actual practices sanctioned by Congress, for section 811(h)'s violation of either of the two structural principles that we rely on, much less for its violation of both. Instead, as to the combining of crime-defining and prosecutorial powers, the government rests chiefly on a formalistic approach to the separation-of-powers doctrine—an approach that simply disregards the reality of the entirely novel concentration of power effected by section 811(h). And as to the preclusion of judicial review, the government merely asserts that there is no reason for concern if a crime-defining executive regulation is allowed to remain in effect for eighteen months, without any pre-prosecution opportunity to test whether it conforms with the intelligible principle that legitimates the congressional delegation in the first

place. In neither instance, moreover, does the government come forward with any convincing argument from practical necessity to explain why relaxation of the ordinary structural protections of the Constitution might be justified here. Lastly, again ignoring the realities of this unique aggregation of power, the government woodenly argues that two general delegation statutes, passed long before the Attorney General had any power like that conferred by section 811(h), should be read to allow the Attorney General to subdelegate this crime-defining power to anyone of his choosing in the Justice Department.

ARGUMENT

1. *The Constitutional Infirmities in Section 811(h) are Cumulative, Not Separate.* Petitioners' primary challenge to section 811(h) is that it permits "the accumulation of excessive authority" (*Mistretta v. United States*, 109 S. Ct. 647, 659 (1989)) in the Attorney General. That official, by congressional determination, is solely responsible for prosecuting essentially all crimes against the United States. *See* Pet. Br. 19 n.13. Pursuant to section 811(h), he is then given the additional discretion to select particular drugs, under broad standards, and make them criminal for a period of eighteen months. During that time, the criminal proscription announced by the Attorney General is immune from judicial review, so that there can be no determination as to whether he acted within the substantive standards established by Congress. At most, according to the government, but contrary to the language of the statute, once someone is indicted, he may then raise a judicial challenge to the temporary scheduling decision.

That is a vast amount of power, directly affecting individual liberties, to repose in one official. It permits that official, all by himself, effectively to prevent the manufacture, distribution, sale, or possession of a drug for a year and a half. It also permits him to bring down

the government's full prosecutorial powers on any individual who violates his non-reviewable, crime-defining decision. Our objection to this process is not, as the government would have it, "that particular officials with the Executive Branch cannot be trusted to execute faithfully Congress's directives." Resp. Br. 29. It is, instead, that our system of checks and balances was expressly designed to provide citizens with structural protections precisely so that case-by-case inquiries into abuse are unnecessary.

Rather than address our argument concerning the cumulative aggregation of unchecked powers that section 811(h) effects, the government attempts to isolate each of the separate statutory infirmities and argue that it, standing alone, survives constitutional attack. Although the government's task is thus made easier, its arguments are nevertheless flawed. As we now show, each of the infirmities in section 811(h), by itself, violates separation-of-powers principles.

2. *Combining the Prosecutorial and Crime-Defining Power Is Impermissible.* The government's principal defense of the concentration of crime-defining and crime-prosecuting power in a single executive officer is flatly to deny that any assignment of powers within the Executive Branch can have constitutional significance. Resp. Br. 25-28. This argument rests on precisely the kind of formalistic approach to separation-of-powers questions that this Court has repeatedly rejected. *See, e.g., Mistretta v. United States*; *Morrison v. Olson*, 487 U.S. 654 (1988). Those cases, following *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 442 (1977), have taken a "pragmatic, flexible approach" to separation-of-powers questions, focusing on whether a particular practice meaningfully usurps another Branch's functions or leads to an excessive aggregation of power within a Branch.

There is no reason to regard this functionalist approach as a one-way street. Just as a congressional assignment of powers can be *validated* when it is found *not* to aggregate too much power, so too should a congressional assignment of powers be *invalidated* when it is found to aggregate too much power. That is precisely what section 811(h) does—not because Congress has somehow "gone too far," but for the more concrete and compelling reason that, because criminal law is distinctive, the power to make otherwise lawful conduct of private citizens into a crime generally may not be given to the same officer who holds the prosecutorial power.[1]

The government is incorrect in arguing that the Constitution imposes no constraints on the assignment of functions within the Executive Branch (Resp. Br. 27). Thus, the Due Process Clause forbids a parole officer who "prosecutes" a parole violation to sit simultaneously as the "judge" of the violation: a different decisionmaker is required because combining the functions of prosecutor and adjudicator undermines the fundamental requirement of separated functions. *Gagnon v. Scarpelli*, 411 U.S. 778, 785-86 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972).[2] Essentially the same constitutional concept of

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[1] Contrary to the government's argument (Resp. Br. 29-30), the *statute* cannot be saved from structural invalidation by the Attorney General's action of giving away the power that Congress has assigned to him. If the statute is invalid, there is no power to subdelegate. Moreover, even aside from the questionable subdelegation here, nothing prevents the Attorney General from revoking the subdelegation at will.

[2] In *Withrow v. Larkin*, 421 U.S. 35 (1975), the Court held that no due process violation was inherent in a state medical examining board's adjudication of disciplinary charges that it had itself investigated and brought based on a probable cause determination. The Court carefully distinguished not only *Gagnon* and *Morrissey* but also other cases that involved a combination of criminal prosecutorial and adjudicatory functions, such as *In re Murchison*, 349 U.S. 133 (1955), and *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). *See Withrow*, 421 U.S. at 53-54, 58.

We note, too, that the Constitution may prohibit the same judges, within the Judicial Branch, from performing certain combinations of functions—such as the appointment of independent counsels and

separated functions in the process of depriving an individual of liberty is reflected in the separation-of-powers principle.[3] If the Constitution generally precludes the combination of prosecutorial and adjudicatory functions in a single executive officer when personal liberty is at stake, it should likewise generally preclude the combination of the lawmaking and prosecutorial power in the same executive officer when personal liberty is at stake. The absence of case law so holding reflects nothing more than the fact—itself of great significance—that what Congress has done in this case is unprecedented.

Although the government seeks to demonstrate that the combination of crime-defining and crime-prosecuting power is not wholly unprecedented, its failure to find more than a single example as well as the nature of that example only confirm the deep historical recognition that this combination of powers represents an excessive aggregation.[4] The government's only example—a statute au-

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the adjudication of cases brought by such independent counsels. *Cf. Morrison v. Olson*, 487 U.S. 654, 683-84 (1988) (stressing statutory requirement of such separation within Judicial Branch in rejecting challenge to independent counsel statute).

[3] Indeed, "due process" takes its core meaning from the accepted processes of law by which individual liberty (or life or property) can be affected, thus incorporating into the Due Process Clause the accepted structural separation of powers in the government. *See Pacific Mut. Life Ins. Co. v. Haslip*, 59 U.S.L.W. 4157, 4164-65 (U.S. Mar. 4, 1991) (Scalia, J., concurring); *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (plurality opinion).

[4] The permanent scheduling authority, relied on by the government (Resp. Br. 31), is different because the Secretary of HHS has absolute veto power over a scheduling decision. And, as for the INS statute cited by the government (Resp. Br. 32 n.27), there is nothing in that omnibus provision or the government's brief to indicate that Congress ever contemplated that the Attorney General would establish criminal rules affecting the entry of aliens; nor is there any suggestion that the Attorney General has ever attempted to do so.

thorizing the Attorney General to define contraband that may not be introduced into prison—is obviously quite different from the present case.[5] First, the actions of prisoners, whose liberty is substantially restricted to begin with, and the relations of other persons to prisoners, are generally subject to diminished constitutional protections. *See, e.g., Thornburgh v. Abbott*, 109 S. Ct. 1874, 1878 (1989); *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). The Constitution's structural protections of liberty may accordingly be relaxed in the prison setting. Second, very different practical considerations support giving the Attorney General authority to criminalize activities at prisons, which *he* is charged with managing and controlling, than would support giving him identical power over citizens for whom he has no custodial responsibility. *Cf. DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989).[6] Finally, it is notable that, even in the special circumstances of prison regulation, Congress did not eliminate judicial review, as it has done in section 811(h). *See* 18 U.S.C. § 4001; *Daugherty v. Harris*, 476 F.2d 292 (10th Cir.), *cert. denied*, 414 U.S. 872 (1973). The structural flaw in the present statute, in short, remains unprecedented.

3. *Judicial Review Is Required.* The government's primary defense of section 811(h)(6)'s preclusion of

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[5] None of the cases upholding this prison-regulation authority (*see* Resp. Br. 31 n.26) addresses the particular challenge we make here.

[6] The government offers no reason, nor is there any, why preservation of the veto power accorded the Secretary of HHS under the permanent scheduling provisions would impair Congress's interest in expediting the temporary process. The government's suggestion that the Attorney General is best situated to make the temporary determination (Resp. Br. 28), moreover, ignores the fact that one of the three criteria set out by Congress—*i.e.*, "[w]hat, if any, risk there is to public health," 21 U.S.C. § 811(h)(3)—is expressly committed to the Secretary's determination under the permanent provisions, 21 U.S.C. § 811(b).

judicial review is to deny that it really is a preclusion. The government says, first, that review is available at the end of a *permanent* listing proceeding—so that review is not denied but merely "postpone[d]." Resp. Br. 32-33. It then says that, in any event, review is available as a defense to a criminal prosecution. *Id.* at 34-36. Having made that two-part argument, the government finally argues that the Constitution is satisfied. *Id.* at 36-39. All of these arguments are incorrect.

a. The government contends that section 811(h)(6) "is simply designed to postpone suits challenging the listing decision until the administrative process has run its course" through the completion of the permanent scheduling process. Resp. Br. 33. That argument mischaracterizes the statutory scheme. A temporary scheduling decision is not simply the first step in a permanent scheduling process that inexorably leads to a judicially reviewable order. On the contrary, a temporary order has full force and effect regardless of whether the government subsequently initiates a permanent scheduling proceeding. There is thus no guarantee of any judicial review. Much less is there any statutory directive to proceed with a permanent scheduling decision under any meaningful time constraint: the temporary order is designed to last for a full year without any additional governmental action. And, as far as the statute indicates, an individual can be convicted and sentenced to up to life in prison based on a temporary scheduling order, his conviction need not be set aside if the drug at issue is not permanently scheduled, and his sentence need not be changed if the drug is permanently placed on a schedule that differs from its placement on Schedule I (the only allowed placement) under the temporary provisions. Hence, section 811(h)(6) does not merely "postpone" review.

The government's attempt to analogize section 811(h)(6) to two statutory provisions that allow a proposed agency rule to take immediate effect without an opportunity for judicial review (Resp. Br. 33 n.29) merely highlights how seriously the government has mischaracterized the present scheme. Both of those statutory provisions, 15 U.S.C. § 2605(d)(2) and 21 U.S.C. § 360f(b), permit emergency orders only as a part of an administrative process that *must* produce a final, judicially reviewable order; and both expressly provide that, if an emergency order is issued, the agency must immediately expedite the process of final decision. No such guarantee of a swift or certain opportunity for judicial review is provided by section 811(h).

b. The government also asserts that judicial review of the Attorney General's compliance with the statutory standards in scheduling a particular drug is available as a defense to a criminal prosecution. Remarkably, the government has never before squarely taken this position.[7]

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[7] Nor has it ever before suggested, as it now tentatively does, that "it is questionable whether petitioners have standing" or that their convictions could be reversed only if section 811(h)(6) "were deemed non-severable from the remainder of the subsection." Resp. Br. 34 n.30. These offerings are misguided. Petitioners were convicted pursuant to a regulation that they argue was invalid because Congress did not properly delegate rulemaking power to the Attorney General. If we are correct in that argument, the Attorney General had no rulemaking power to exercise and his temporary scheduling regulations were thus void. Severing the invalid portion of the temporary scheduling statute *now*, moreover, cannot legitimate *prior* scheduling orders that were adopted when the disciplinary effect of the required structural protections were not in place.

In any event, the *sole* authority that the government cites for its position is 28 U.S.C. § 2111, the codification of the harmless error rule. But since no harmless error claim was raised below, it should not be considered here. *See, e.g., United States v. Giovannetti*, 1991 U.S. App. Lexis 4509 (7th Cir. Mar. 21, 1991). Moreover, as this Court has previously recognized, the possibility of severance does not defeat standing to challenge the constitutional validity of a statute. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (finding invalid provisions severable *after* consideration of merits); *United States v. Jackson*, 390 U.S. 570, 585-91 (1968) (same). There is, accordingly, no reason the severability question should

In any event, the position is untenable given the plain language of section 811(h)(6), which unqualifiedly states that "[a]n order issued under paragraph (1) [*i.e.*, a temporary scheduling order] is not subject to judicial review." Thus, "[w]hat the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court." *West Virginia Univ. Hosp., Inc. v. Casey*, 59 U.S.L.W. 4180, 4185 (U.S. Mar. 19, 1991) (quoting *Iselin* v. *United States*, 270 U.S. 245, 250-51 (1926)). By contrast, none of the cases cited by the government (Resp. Br. 35 nn. 32 & 33, 36 n.35) involved statutes with language prohibiting judicial review in terms nearly as clear as the language of section 811(h).[8]

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not be deemed waived where, as here, the government has failed to raise it in the courts below.

[8] Indeed, of the four decisions cited in note 32, only one even involved a provision that limited judicial review, *Estep v. United States*, 327 U.S. 114, 119 (1946). And in that case (cited again at Resp. Br. 36 n.35), the preclusive language merely provided that a military induction order was "final." Such language, which is sometimes a *prerequisite* to judicial review, hardly forms the basis for denying review of a defense to a criminal prosecution. 327 U.S. at 119.

Of the cases cited in note 33—one of which finds that review *was* barred, *Califano v. Sanders*, 430 U.S. 99 (1977)—none involved preclusive language that, like section 811(h), completely denied any form of judicial review. Thus, the more limited preclusive provisions in those cases were reasonably construed not to cover the particular order or claim at issue. For example, *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), and *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), both held that a limitation on review of individualized agency determinations did not bar collateral constitutional or statutory challenges to systemic practices or policies. *See* Pet. Br. 27. Similarly, *Johnson v. Robison*, 415 U.S. 361 (1974), held that a constitutional challenge to a statute was not barred by a provision limiting review of an agency's individual benefits determinations. And *Dunlop v. Bachowski*, 421 U.S. 560 (1975), involved a provision that did not refer to judicial review at all.

Finally, the two cases cited by the government in note 35—which the government itself characterizes as involving ambiguous statutes

c. The government also argues that the preclusion of pre-prosecution judicial review is constitutionally permissible. But the government cannot cite a single precedent that upholds such preclusion with respect to a criminally enforceable rule. Instead, the government relies principally on *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), a case that involved only *civil* seizure actions implicating *property* rights—a point the Court took pains to emphasize (*id.* at 599). Moreover, this Court has already rejected the government's previous reliance on *Ewing* in circumstances essentially identical to those presented here. Thus, in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 147 (1967), the Court explained that "[t]o equate a finding of probable cause for proceeding against a particular drug manufacturer [which was involved in *Ewing*] with the promulgation of a self-operative, industry-wide regulation," was misguided. Indeed, "the determination of probable cause in *Ewing* has 'no effect in and of itself,' 339 U.S. at 598; only some action consequent upon such a finding would give it life." *Abbott Laboratories*, 387 U.S. at 147 (quoting *Ewing*).

The government also relies on *Clark v. Gabriel*, 393 U.S. 256 (1968), but that decision likewise explicitly noted that pre-prosecution judicial review *was* available if an inductee accepted induction and filed a habeas corpus petition. The government stresses that *Clark* required

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(Resp. Br. 36 n.35)—offer no greater support to the government's attempt to rewrite section 811(h)'s unambiguous ban on judicial review. We have discussed *Estep* above. And *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), merely held that a criminal defendant charged with violating an agency order was entitled to a judicial ruling on the complex question whether it was the type of order (a proper "emission standard") that was covered by the provision barring judicial review of certain agency orders in criminal prosecutions. Here, by contrast, there is no dispute that the temporary scheduling order is the type of order covered by section 811(h)'s bar on judicial review. *Adamo* also provided for pre-prosecution direct judicial review, which is not available here.

compliance with an order without immediate judicial review, but that is not what is at issue here: if an individual complies with a temporary scheduling order under section 811(h), there is no way to secure judicial review, period.[9] Unlike in *Clark*, therefore, the only way to get judicial review of a temporary order under the government's view is to risk criminal liability.

d. Ironically, the government's brief itself indicates that the need for judicial review is by no means a theoretical concern here. Thus, the government disputes our assertion that section 811(h) was intended only to apply to "newly designed or created" drugs. Resp. Br. 12 n.16 (quoting Pet. Br. 6 n.3). Yet, in invoking its temporary scheduling authority, the government has often quoted a passage in the House Report making precisely the same point that we did: "This new procedure [emergency scheduling] is intended by the Committee to apply to what has been called 'designer drugs,' *new* chemical analogs or variations of existing controlled substances, or other *new* substances." 52 Fed. Reg. 30,174 (Aug. 13, 1987) (notice regarding temporary scheduling of 4-methylaminorex) (emphasis added) (quoting H.R. Rep. No. 835, 98th Cong., 2d Sess. (1984)). Thus, contrary to the government's repeated suggestions (*e.g.*, Resp. Br. 34 n.30), there *is* a question as to whether 4-methylaminorex, even if subject to permanent scheduling, could have been properly scheduled temporarily, because it was hardly a new drug in 1987. *See* Pet. Br. 6 n.3.

The government likewise has changed its position on what criteria must be met for a drug to be scheduled under section 811(h). In its most recent brief, the gov-

[9] As we noted in our opening brief (Pet. Br. 34), Congress might well be able to make a scheduling order immediately effective while judicial review was being sought, but it has not done so. In *Clark*, of course, the government had a compelling interest in securing immediate compliance with military induction orders prior to judicial review.

ernment says that, in addition to the criteria set out in section 811(h)(3), temporary scheduling decisions must conform with the Schedule I criteria in 21 U.S.C. § 812(b)(1). Resp. Br. 5 & n.4. In the court of appeals, however, the government made no reference to 21 U.S.C. § 812(b)(1), arguing instead that "the statutory list of considerations in subsection (h)(3) is sufficient to satisfy constitutional requirements." Appellee's Br. 10 & n.3. Thus, it would appear that not even the government is sure about which criteria the Attorney General must satisfy if he is to criminalize a drug. To clarify such questions, and to hold the Attorney General to the proper standard, is precisely the function of judicial review. *Compare Grinspoon v. DEA*, 828 F.2d 881, 889 (1st Cir. 1987) (clarifying criteria for permanent scheduling).

4. *Subdelegation Is Prohibited.* The government contends that the language of 28 U.S.C. § 510 and 21 U.S.C. § 871(a) is broad enough to permit the Attorney General to delegate his crime-defining authority to any "officer" or "employee" and, therefore, to the DEA Administrator. We agree that the language, on its face, is sufficient for that purpose. But the language must be read in light of the nature of the power being delegated.

The power at issue here is beyond doubt of a constitutionally extraordinary character. Given its novelty in 1984, the power plainly was not within the contemplation of the Congress that, years earlier, had enacted 28 U.S.C. § 510 and 21 U.S.C. § 871(a). In these circumstances, the Court should hold the power non-delegable by the Attorney General. Indeed, the argument for such a result is not only that Congress should be more explicit before allowing any "employee" of the Justice Department to define crimes, but also that the Court could thereby avoid a direct and definitive ruling on the constitutional questions. See, *e.g.*, *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) (construing statute not

to be retroactive in light of "substantial doubt" about constitutionality of retroactive statute).

CONCLUSION

The judgments against petitioners should be reversed.

Respectfully submitted,

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